(1) 95-1621

No.

In The

Supreme Court of the United States

October Term, 1995

HARBOR TUG AND BARGE COMPANY,

Petitioner,

vs.

JOHN PAPAI and JOANNA PAPAI,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Can an injured land-based maritime worker sue for seaman remedies after an Administrative Law Judge has formally determined that he was an LHWCA worker and not a seaman at the time of the injury?

II. Is a claimant's status as a seaman or not to be determined by his work history with his employer at the time of the injury, or by his entire work history?

PARTIES TO THE ACTION

Plaintiffs/Respondents:

John Papai and Joanna Papai.

Defendant/Petitioner:

Harbor Tug and Barge Company.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner Harbor Tug and Barge Company discloses that it formerly was a California corporation, and that on August 1, 1992 it was merged into Crowley Marine Services, Inc., a Delaware corporation. Crowley Marine Services, Inc., which has no subsidiaries that are not wholly owned, is a wholly owned subsidiary of Crowley Maritime Corporation, a California corporation.

TABLE OF CONTENTS

Contents

TABLE OF CITATIONS

Cases Cited:

Statutes Cited:

Other Authorities Cited:

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit dated September 25, 1995, is reported at 67 F.3d 203 (9th Cir. 1995) and is reproduced in Appendix A to this Petition ("Pet. App."), pp. 1a-19a. The Ninth Circuit's unreported Order dated December 12, 1995, denying Harbor Tug and Barge Company's petition for rehearing or rehearing en banc is reproduced in Appendix B at Pet. App. pp. 20a-21a.

The following unreported rulings of the District Court are reproduced in the Appendices: Order Granting Partial Summary Judgment To Defendant Harbor Tug And Barge Company, May 29, 1990, Appendix C, Pet. App. pp. 22a-23a; Order Of Denial Of Reconsideration And Statement Of Grounds For Immediate Appeal, August 17, 1990, Appendix D, Pet. App. pp. 24a-25a; Order Confirming Summary Adjudication That Plaintiff Was Not A Seaman, April 6, 1992, Appendix E, Pet. App. pp. 26a-27a; and Judgment In Favor Of Defendant Harbor Tug And Barge Company, December 28, 1992, Appendix F, Pet. App. pp. 28a-29a.

The unreported Decision and Order of Administrative Law Judge Paul Mapes dated August 27, 1992, in Case No. 92-LHC-403, OWCP No. 13-85230, is reproduced in Appendix G at Pet. App. pp. 30a-57a.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was issued on September 25, 1995. On October 6, 1995, Harbor Tug and Barge Company duly filed its Petition for Rehearing or Rehearing En Banc, which the Ninth Circuit denied by Order dated December 12, 1995. On March 1, 1996, Justice O'Connor approved an extension of time for filing a petition for

a writ of certiorari to and including April 10, 1996. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutes involved in this case are: (i) 33 U.S.C. § 902(3)(G), part of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901 *et seq.* 33 U.S.C. § 902(3)(G) is reproduced in Appendix H at Pet. App. p. 58a; (ii) 46 U.S.C. § 688(a), the "Jones Act". The relevant portion of § 688(a) is reproduced in Appendix H at Pet. App. p. 58a.

STATEMENT OF THE CASE

A. Statement of Facts.

1. The Accident.

Respondent John Papai ("Papai") injured his knee while painting aboard the tug PT. BARROW (the "Tug"), which was docked at Alameda, California. The Tug was operated by Petitioner Harbor Tug and Barge Company ("HTB").[1]

Papai was not a permanent employee of HTB and was not permanently assigned to the Tug. He worked at various maritime related jobs for various companies. He obtained his maritime jobs through the Inland Boatman's Union ("IBU") hiring hall. The job he was performing on the day he was injured was a one day maintenance painting job.

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1. The factual record before the District Court when deciding the motions regarding seaman status is found in the following pleadings in the Clerk's Record (page references are to Papai's Excerpt of Record): CR10, pp. 38-85; CR11, pp. 87-91; CR15, pp. 111-116; and CR50, pp. 249-270. The Ninth Circuit's more succinct recitation of the facts is at Pet. App. pp. 2a-3a.

On the morning of March 13, 1989, Papai arrived at the HTB Dock in Alameda. Don Dawson of HTB, Papai's supervisor that day, told Papai and Edwin Low, a co-worker, to paint the "house" (the superstructure) on the Tug.

The Tug was tied to the dock. The Tug was unmanned; no operational crew members were aboard that day. Papai was not on ship's articles, and he did not take any orders from any Tug officers. The engines of the Tug did not run at all during the day while Papai was aboard.

Papai and Low went to the Tug and began painting. In the late morning, Dawson asked Low to shift over and work on another HTB tug across the dock. Low did so, and thereafter Papai worked alone.

At about 3:30 p.m. Papai was painting at the forward side of the house. He was using a portable ladder. He alleges that as he was climbing down the ladder, the ladder "moved", causing him to fall off and injure his knee.

2. Papai's Work History.

Papai entered the work force in 1968. Between 1968-1972 he worked as a mail clerk for the federal government. From 1972-1977 he owned and managed a bar. From 1979-1983 he worked as a bartender at various shoreside establishments. From about 1983-1986 he worked for a company that performed catering services for party and ferry boats. He worked aboard the boats but lived at home. The catering company that employed him did not own or operate the boats. His job was to help stock the boats with food, set up, serve the food, and clean up afterward.

Beginning in 1987 Papai began to obtain jobs out of the IBU hiring hall in San Francisco, California. From then until the date

of the accident Papai worked at various jobs for various employers. Most of the jobs were for one day, but some were for two or three days. The longest job he had was for 40 days working for the Golden Gate Transit District, chipping rust and painting on the dock at the San Francisco Ferry Terminal. Usually, however, once Papai finished a job for the day, he would go back to the IBU hiring hall the next day to put in for another job.

The jobs Papai had during the 1987 - March 1989 period consisted mostly of maintenance work, deckhand work, and longshoring work. Maintenance work consisted of chipping rust and painting. This was done while boats were tied to a dock. Deckhand work consisted mainly of manning the lines on boats during docking and undocking. That work was done on boats that were working. Longshoring work consisted of helping to load and discharge vessels that were docked. He also did some shoreside bartending during this period. During the 1987 - March 1989 period Papai lived, ate, and slept at home.

From January 1, 1989, until the date of the accident on March 13, 1989, Papai had worked for HTB from time to time, for a total of thirteen days. Papai last worked for HTB about nine days before the accident, when he worked on a different tug. Although Papai had worked on the Tug a few times before, each time that he had worked on the Tug he had performed maintenance work only. The Tug was always tied to the dock when Papai had worked on it.

The job Papai had on the day of the accident was a one-day job. Papai was not going to sail with the Tug; he was to go back to the IBU hiring hall the next day to see if he could get another job. He was paid hourly, including on the day he was injured.

B. Procedural History of the Case.

1. Papai's Civil Action.

In January 1990 Papai filed his Complaint against HTB in the U.S. District Court for the Northern District of California, seeking damages for personal injuries, and alleging causes of action for negligence under the Jones Act (46 U.S.C. § 688) and for unseaworthiness under the general maritime law. Papai could assert such causes of action only if he was a "seaman" at the time of his accident. In April 1990 HTB moved for summary judgment that at the time of the accident Papai was not a seaman. The District Court (Judge Charles A. Legge) granted HTB's Motion by Order dated May 29, 1990. (Appendix C.)

In May 1990 Papai filed a First Amended Complaint against HTB for damages for personal injuries, asserting a cause of action for negligence under § 905(b) of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901 *et seq.*, and under general negligence principles.

In June 1990 Papai moved for reconsideration of the District Court's determination that he was not a seaman. By Order dated August 17, 1990, the Court denied the Motion and reaffirmed that Papai was not a seaman. (Appendix D.) Following two subsequent U.S. Supreme Court decisions concerning seaman status, the District Court asked for further briefing on the seaman status issue. On April 6, 1992, following that briefing, the District Court issued an order confirming that at the time of the accident Papai was not a seaman within the meaning of the Jones Act or the general maritime law. (Appendix E.)

Trial was to the District Court without a jury in August-September 1992. The District Court held that Papai had not established any negligence by HTB under either § 905(b) of the LHWCA or under general negligence principles. The District

Court therefore issued a Judgment in favor of HTB. (Appendix F.) Papai appealed to the Ninth Circuit.

2. Papai's LHWCA Compensation Action.

While Papai's civil action was pending, so too was his LHWCA compensation action. Soon after his injury, Papai had made a claim against HTB under the LHWCA for compensation and medical benefits. HTB paid Papai those benefits on an interim basis. However, Papai and HTB disputed several LHWCA compensation issues, including LHWCA coverage (Papai's status as an LHWCA worker or as a seaman). Members of the crew of a vessel (i.e., seamen) are not covered by the LHWCA and are not entitled to LHWCA benefits. 33 U.S.C. § 902(3)(G).

LHWCA compensation issues are determined by formal administrative trials before an Administrative Law Judge ("ALJ") of the U.S. Department of Labor. For an extensive period Papai's civil (Jones Act) litigation and his LHWCA compensation action proceeded simultaneously. On June 2, 1992, ALJ Paul Mapes held a formal trial in the LHWCA case. He received oral testimony, deposition testimony, exhibits, and briefing by the parties. On August 27, 1992, he issued his written Decision and Order. (Appendix D.)

In his decision the ALJ addressed in detail the issue of Papai's status as an LHWCA worker or as a seaman. In the LHWCA compensation action, Papai asserted that he was an LHWCA worker and not a seaman, and that he therefore was entitled to compensation under the LHWCA. HTB took the position in the LHWCA compensation action that if Papai was a seaman, as he was asserting in the civil action, then he was excluded from LHWCA coverage.

The ALJ held that the evidence showed that Papai was an LHWCA worker, not a seaman, and thus that Papai was entitled to LHWCA compensation benefits. (Pet. App. at pp. 34a-37a.) The ALJ made a formal award of benefits to Papai.

A decision by an ALJ in an LHWCA compensation case can be appealed to the Benefits Review Board, and then to the courts. The appeal must be filed within 30 days. 20 C.F.R. § 802.206 (1995). Neither Papai nor HTB appealed the ALJ's Decision and Order of August 27, 1992. Thus it became final and binding.

3. The Appeal of the Civil Action.

On September 25, 1995, the Ninth Circuit Court of Appeals (Judge Poole dissenting) reversed the District Court's ruling on summary judgment that Papai was not a seaman and held that a jury should have decided that issue. (Appendix A.) The Ninth Circuit also held that the ALJ's decision that Papai was an LHWCA worker and not a seaman did not bar Papai's claim to seaman remedies in the civil action. The Ninth Circuit's decision is reported at 67 F.3d 203.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE A CONFLICT AMONG THE CIRCUITS ABOUT WHETHER A CLAIMANT CAN SUE FOR SEAMAN REMEDIES EVEN AFTER AN ADMINISTRATIVE AGENCY HAS FORMALLY FOUND THAT THE CLAIMANT WAS NOT A SEAMAN.

The Supreme Court has clearly held that LHWCA worker remedies and seaman remedies are mutually exclusive. The Fifth Circuit has held that a formal finding of LHWCA worker (*i.e.*, non-seaman) status precludes a claimant from thereafter seeking seaman remedies. A decision by the Second Circuit

reached the same result. The Ninth Circuit's decision in this case, however, allows Papai to seek seaman remedies despite the ALJ's formal finding that he was an LHWCA worker, not a seaman. The Ninth Circuit's decision thereby creates a conflict among the Circuits with regard to the proper interpretation of the statutory scheme.

A. Seaman Remedies And LHWCA Remedies Are Mutually Exclusive.

1. Seaman Remedies (The Jones Act).

The Jones Act, passed in 1920, provides a cause of action in negligence to any "seaman" injured in the course of his employment. 46 U.S.C. § 688(a). Under the general maritime law before 1920, an injured seaman could seek damages from the shipowner if the injuries were caused by the vessel's unseaworthiness. An injured seaman also was entitled to "maintenance" (subsistence) and "cure" (medical care) until he recovered from the injury. However, the seaman could not sue for negligence. The Jones Act added a negligence cause of action against the employer to the seaman's potential remedies for injury. *Chandris, Inc. v. Latsis*, __ U.S. __, 115 S. Ct. 2172, 2183 (1995).

2. LHWCA Remedies.

The LHWCA (33 U.S.C. § 901 *et seq.*) was enacted in 1927 to provide a form of workers compensation in lieu of tort damages for land-based maritime workers, particularly longshoremen, but also including other employees who perform work in connection with vessels. As of 1927 such workers generally were excluded from state workers compensation coverage. The LHWCA requires an employer to provide wage compensation and medical benefits to an injured LHWCA worker regardless whether the employer was at fault for the

injury, so long as the injury arises out of the worker's employment. In return for compelling the employer to pay the wage compensation and medical benefits regardless of fault, the LHWCA sets a schedule of benefits and grants the employer immunity from tort liability for the injury. 1 Schoenbaum, *Admiralty and Maritime Law* (2d Ed. 1994), pp. 371-2.

In addition to the scheduled LHWCA benefits, an injured LHWCA worker has the right to sue third parties for negligence causing the injury. 33 U.S.C. § 905(b). Such third parties include the owner and operator of the vessel on which the worker is injured. Under the so-called "dual capacity doctrine," the worker can sue the shipowner even if the shipowner also is his employer, but the worker can sue the dual shipowner/employer only for negligence in its shipowner capacity, not for negligence in its employer capacity. *Reed v. Yaka*, 373 U.S. 410 (1963). (Thus in this case Papai as an LHWCA worker was able to sue HTB for negligence — even though HTB was Papai's employer and paid him LHWCA benefits — in HTB's capacity as the operator of the Tug.)

3. Seaman Status And LHWCA Worker Status Are Mutually Exclusive.

The Supreme Court has stated several times recently that seaman status and LHWCA worker status are mutually exclusive, not concurrent. A worker can be a seaman or an LHWCA worker, but not both.

In *McDermott Intern., Inc. v. Wilander*, 498 U.S. 337 (1991), the Supreme Court stated:

> The Act [LHWCA] provides recovery for injury to a broad range of land-based maritime workers, but explicitly excludes from its coverage "a master or member of a

> crew of any vessel." 33 U.S.C. § 902(3)(G). This Court recognized the distinction, albeit belatedly, in *Swanson v. Marra Brothers, Inc.*, 328 U.S. 1, 66 S.Ct. 869, 90 L.Ed. 1045 (1946), concluding that the Jones Act and the LHWCA are mutually exclusive. The LHWCA provides relief for land-based maritime workers, and the Jones Act is restricted to "a master or member of a crew of any vessel" . . . "[M]aster or member of a crew" is a refinement of the term "seaman" in the Jones Act; it excludes from LHWCA coverage those properly covered under the Jones Act.

In *Chandris, Inc. v. Latsis*, 115 S. Ct. 2172, 2183, the Supreme Court stated:

> Congress provided some content for the Jones Act [seaman status] requirement in 1927 when it enacted the Longshore and Harbor Workers' Compensation Act (LHWCA), which provides scheduled compensation (and the exclusive remedy) for injury to a broad range of landbased maritime workers but which also explicitly excludes from its coverage "a master or member of a crew of any vessel." [Citations omitted.] As the Court has stated on several occasions, the Jones Act and the LHWCA are mutually exclusive compensation regimes. . . .

Therefore a claimant has standing to assert a cause of action under the Jones Act (46 U.S.C. § 688) or the general maritime law only if he is a "seaman" at the time of his injury. If he is a seaman,

then he is not entitled to benefits under the LHWCA. 33 U.S.C. § 902(3)(G). Conversely, if the claimant is an LHWCA worker rather than a seaman, then he is entitled to compensation benefits under the LHWCA, and he can assert a cause of action for negligence under § 905(b) of the LHWCA, but he cannot sue under the Jones Act or the general maritime law.

As described above, the ALJ — after formal hearing — determined that Papai was an LHWCA worker and not a seaman. The issue now is not whether the ALJ was correct in that decision. The ALJ's decision was not appealed, and therefore it is final. The issue now is the effect of that final ALJ decision, namely whether it bars Papai from seeking seaman remedies thereafter.

B. A Claimant May Initially Pursue Both LHWCA Remedies And Seaman Remedies Without Having to Make an Election of Remedies.

The mere receipt of LHWCA benefits, which often are paid voluntarily by an employer in the absence of a formal LHWCA award, does not in itself preclude seaman status. *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991). Therefore a claimant may pursue both potential remedies — LHWCA and seaman (including the Jones Act) — until his status is formally determined.

The *Gizoni* decision interpreted the statutory scheme as not intended to force the injured worker to make an initial election of remedies that could preclude any recovery at all. *Gizoni* is consistent with the modern view that the common law "election of remedies" doctrine is excessively harsh. *See* 18 Wright, Miller & Cooper, *Federal Practice and Procedure* (1981) § 4477, at p. 773. If an election of remedies approach were applied, a plaintiff might pursue an LHWCA action believing that he was a seaman, receive interim benefits under the LHWCA, but be denied benefits by the ALJ on the ground that he

was not in fact a seaman — and then be unable to pursue a Jones Act remedy because he had elected an LHWCA remedy. Thus, making the worker choose between the potential right to an immediate workers compensation remedy and the Jones Act remedy to which he or she may be entitled would "force injured maritime workers to an election of remedies we do not believe Congress to have intended." *Gizoni*, 502 U.S. at 92 n.5.

C. The Fifth, Second And Ninth Circuits Are In Conflict About Whether A Claimant Who Has Been Formally Determined To Be An LHWCA Worker Still Can Pursue Seaman Remedies.

The rule in the Fifth Circuit and Second Circuit is that a formal finding of LHWCA worker status bars a claimant from seeking further remedies as a seaman. The Ninth Circuit rule promulgated in this case is in direct conflict with the law in these other Circuits.

1. The Position of the Fifth Circuit and Second Circuit.

In the Fifth Circuit a formal award of LHWCA compensation benefits precludes further claim to seaman remedies. *Sharp v. Johnson Bros. Corp.*, 973 F.2d 423 (5th Cir. 1992). In *Sharp* the Fifth Circuit held that an ALJ order approving a settlement of LHWCA benefits precluded subsequent seaman remedies. The *Sharp* Court emphasized that while Congress did not intend that a claimant forfeit the right initially to pursue both remedies simultaneously, Congress also did not intend that the claimant be able to pick and choose his ultimate recovery based upon which remedy has conferred upon him a larger award.

The Fifth Circuit in *Sharp* explained the rationale for its conclusion:

> Our holding is consistent with the purpose of the LHWCA .... The LHWCA was not designed to create a mere safety net, guaranteeing workers a minimum award as they seek greater rewards in court. Rather, it has a benefit to employers, too, giving them limited and predictable liability in exchange for their giving up their ability to defend tort actions. [Citations omitted.] Permitting a Jones Act proceeding after a formal compensation award here would defeat the purpose of the LHWCA, as well as work an unfairness.... [973 F.2d at 426-7.]

The Fifth Circuit also explained the principles underlying the preclusive effect of an ALJ's determination of a claimant's LHWCA status in *Fontenot v. AWI, Inc.*, 923 F.2d 1127, 1132-1133 (5th Cir. 1991):

> Permitting a trial court to redetermine issues decided by the administrative system effectively defeats the purpose of the LHWCA. Instead of creating certainty for both employer and employee, permitting a trial court to redetermine the coverage issue reintroduces uncertainty for both. Instead of lowering the cost of recovery for an injured worker, the worker must pay counsel both for representation on the LHWCA claims and again in seeking a jury award. Furthermore, if we permit a trial court and the Department to reach inconsistent determinations of the coverage issue, an injured worker may receive both a jury trial and an LHWCA remedy, or neither, despite the intention of Congress that he receive one or the other. In

enacting the LHWCA, Congress intended that it be the sole and exclusive remedy for workers within its scope, not a stepping stone on the way to a jury award.

While we recognize that there are differences between the fact-finding processes in the administrative forum and in the judicial forum, we doubt that these differences are sufficient to deprive an injured employee of a fair opportunity to present the coverage issue before the Department. As a result, a finding of LHWCA coverage sought and obtained by the injured worker from the Department should preclude any subsequent action against his employer for the same injury.

The Second Circuit also has decided that a formal finding of LHWCA worker status precludes subsequent recovery as a seaman. *Hagens v. United Fruit Co.*, 135 F.2d 843 (2d Cir. 1943) (holding that where a worker had received a formal award of compensation under the LHWCA, he was barred from seeking seaman remedies under the Jones Act). *See also Roth v. McAllister Bros., Inc.*, 316 F.2d 143 (2nd Cir. 1963), in which a tugboat operator had prevailed in a New Jersey workers compensation proceeding on the ground that the claimant was a seaman (and thus excluded from compensation coverage). The Court held that the tugboat operator was estopped from arguing in a subsequent Jones Act action that the plaintiff was not a seaman, stating that the plaintiff could not "assume a contrary position in a subsequent proceeding elsewhere simply because its interests have changed. . ." *Roth*, 316 F.2d at 145.

The leading treatise on the subject is in agreement that a finding of non-seaman status in an LHWCA proceeding bars

further remedies as a seaman. 4 Larson, *The Law of Workmen's Compensation* (1989) § 90.51(c), at p. 16-519 states:

> But when all of the cases in which for assorted reasons the requisites of a true res judicata case were incomplete are set to one side, there remains the basic rule that if the Deputy Commissioner [of the Department of Labor] has made a valid and specific finding of noncrewmember status, in a case in which this question has been put in issue and in which the parties have had an opportunity to address themselves to the matter, that finding should be res judicata on the issue of crew member status and should bar a subsequent Jones Act proceeding.

See also 1 Schoenbaum, *Admiralty and Maritime Law* (2nd Ed. 1994), § 6.9, at p.260 n.38 ("A worker cannot play on both sides of the street too long; if he accepts a formal compensation award, he will be barred from bringing a Jones Act action for the same injuries.")

2. The Position of the Ninth Circuit.

The Ninth Circuit's decision in this case recited the principle of the mutual exclusivity of LHWCA remedies and seaman remedies, and agreed that the ALJ had "fully adjudicated" Papai's LHWCA claim, including his status as an LHWCA worker (non-seaman). Nevertheless, the Ninth Circuit held that despite the ALJ's finding, Papai is allowed to seek seaman remedies against HTB.

In coming to its decision, the Ninth Circuit pointed out that the claimant will not receive a double recovery, because the amount paid under one remedy scheme is credited against the

amount owed under the other.[2] The Ninth Circuit believed that in relying on the absence of a double recovery to deny preclusive effect to the ALJ's finding, it had support from certain dictum in *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991).[3] The Ninth Circuit was concerned with the fairness in barring an LHWCA worker from seeking seaman remedies — the employer might have a disincentive to litigate vigorously its defense in the LHWCA action since the parties may be on opposite sides of the seaman status issue in that proceeding compared with the civil suit. The Ninth Circuit also noted that imposing a bar would result in subjecting to civil suit an employer who voluntarily paid LHWCA compensation benefits while immunizing from suit an employer who forces the employee to seek compensation through a formal LHWCA proceeding. Finally, the Ninth Circuit's decision relied upon Gilmore & Black, *The Law of Admiralty* (2d Ed. 1975), p. 435, which asserted the policy preference that the award of LHWCA benefits should be treated as an entitlement, but not a bar to a future damage recovery as a seaman. (67 F.3d at 207-08; Pet. App. pp. 11a-12a.)

2. This is not completely so, because it does not take attorney fees into account, and because the credits are not congruent with the amounts the employer has paid. *Massey v. Williams McWilliams, Inc.*, 414 F.2d 675, 679-80 (5th Cir. 1969).

3. The Ninth Circuit stated that its decision to allow a claimant to pursue both remedies to conclusion was "extending the reasoning of the *Gizoni* Court to the next logical step . . ." *Papai*, 67 F.3d at 208 (Pet. App. p. 12a), referring to the Supreme Court's reasoning in *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991). In *Gizoni*, the employer had argued that the employee's receipt of benefits under the LHWCA should preclude the claimant's subsequent claim under the Jones Act, even though his status had not been litigated before the ALJ. The Supreme Court stated: "It is by now 'universally accepted' that an employee who receives voluntary payments under the LHWCA without a formal award is not barred from subsequently seeking relief under the Jones Act. [Citations omitted.] *This is so, quite obviously, because the question of coverage has never actually been litigated.*" (Emphasis added.) *Gizoni, id.*, 502 U.S. at 91. Contrary to the Ninth Circuit's decision, the implication is that if coverage (status) *had* been litigated, the employee could not later seek relief under the Jones Act.

D. This Court Should Grant Certiorari to Resolve This Conflict Among The Circuits.

A clear conflict exists among the Second, Fifth, and Ninth Circuits about whether an ALJ's formal finding of LHWCA worker status precludes the claimant from then seeking seaman remedies. These three Circuits are heavily involved with such maritime law issues. The Fifth Circuit includes the Gulf Coast (from which seaman status issues most frequently arise), the Ninth Circuit includes all U.S. West Coast ports, and the Second Circuit includes the port of New York. These three Circuits accounted for 86% of all Jones Act maritime personal injury claims filed in 1995.[4]

The conflict among these Circuits is not limited to the holdings on the facts of the cases on this point; the Circuits have fundamental policy differences. The policy underlying the Ninth Circuit's decision in *Papai* (and stated in Gilmore & Black) is in sharp conflict with the policy underlying the decisions in *Sharp* and *Fontenot* (and stated in Larson). While both Courts recite that LHWCA remedies and seaman remedies are "mutually exclusive," the Fifth Circuit interprets that to mean that a claimant can be an LHWCA worker or a seaman but not both, while the Ninth Circuit interprets that to mean that a claimant can recover under both remedy schemes and choose the higher award, so long as he does not receive a double recovery.

This is a fundamental conflict about a central principle underlying the LHWCA and seaman remedy schemes. The Fifth Circuit takes the position that in exchange for obtaining a formal

4. Some 869 civil cases involving marine personal injury claims under the Jones Act were commenced in U.S. district courts in 1995. Of these cases, 746 were in the Second, Fifth, and Ninth Circuits. Memorandum from Mr. Maurice Galloway, Administrative Office of the United States Courts, Statistics Division, March 21, 1996. A copy of this memorandum is being lodged with the Court.

determination of LHWCA status and thereby ensuring a secure LHWCA remedy, the claimant forfeits the ability to argue in a later Jones Act action that the LHWCA was inapplicable. The Fifth Circuit sees the LHWCA and the Jones Act as balancing the interests of employee and employer, allowing the employee to obtain a secure remedy, if desired, in exchange for eliminating the risk of a trial for both the employee and employer. *See Fontenot,* 923 F.2d at 1132-33 n.38. Conversely, the Ninth Circuit's decision reflects the view that the fundamental purpose of Congress in enacting these statutes was to protect injured employees, and therefore the Ninth Circuit allows an employee not just to pursue initially, but also to litigate to the end, inconsistent positions in order to obtain the maximum recovery possible.

The decision on this issue is of vital interest to the maritime industry. The Ninth Circuit's decision will multiply the already significant number of litigated and administrative controversies about LHWCA or seaman status and the relationship between LHWCA remedies and seaman remedies.[5] As is described in *Sharp* and *Fontenot,* these issues have significant economic ramifications both to workers and employers. Further, seaman status is an issue of federal maritime law, which is supposed to be national and uniform in its approach. *Southern Pacific v. Jensen,* 244 U.S. 205 (1917). The conflict among the Circuits creates disuniformity and confusion regarding the effect of a formal finding of LHWCA worker status.

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5. LHWCA compensation totalling $604.3 million was paid to workers in 36,577 cases in Fiscal Year 1992, the latest year for which published statistics are available. *See* Annual Report to Congress of the U.S. Department of Labor, Office of Workers' Compensation Programs (FY 1992), at 21. The Department of Labor adjudicated 3,558 cases under the LHWCA in Fiscal Year 1995. Memorandum from Ms. Seena K. Foster, Senior Staff Attorney, Office of Administrative Law Judges, U.S. Department of Labor, March 26, 1996. A copy of this memorandum is being lodged with the Court.

E. The Significance of this Case Is Not Limited to Its Statutory Context But Raises Broader Questions Regarding the Estoppel Effect to Be Accorded to Administrative Agency Decisions.

The Ninth Circuit's decision in *Papai* reflects a broader reluctance to apply estoppel principles to claims that involve issues raised in prior administrative proceedings. The Ninth Circuit's approach is in accord with the view of a number of academic commentators but is inconsistent with the approach taken by other Circuits.

The Supreme Court has made clear that absent contrary legislative intent, collateral estoppel should presumptively apply to issues finally decided in a prior administrative proceeding, if the administrative agency was acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties had an adequate opportunity to litigate. *See Astoria Federal Savings & Loan Assn. v. Solimino,* 501 U.S. 104 (1991). *See also University of Tennessee v. Elliott,* 478 U.S. 788 (1986); *United States v. Utah Constr. & Mining Co.,* 384 U.S. 394 (1966).

However, legal commentators have criticized the application of estoppel principles to bar claims by plaintiffs that involve issues raised in prior administrative proceedings.[6] In

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6. *See* Marjorie A. Silver, *In Lieu of Preclusion: Reconciling Administrative Decisionmaking and Federal Civil Rights Claims,* 65 Indiana L. Rev. 367 (1990); Jay Carlisle, *Getting a Full Bite of the Apple: When Should the Doctrine of Issue Preclusion Make an Administrative or Arbitral Determination Binding in a Court of Law?,* 55 Fordham L. Rev. 63 (1986); Rex R. Perschbacher, *Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings,* 35 U. Fla. L. Rev. 422 (1983); David A. Brown, Note, *Collateral Estoppel Effects of Administrative Agency Determinations: Where Should Federal Courts Draw the Line?,* 73 Cornell L. Rev. 817 (1988). For a view that *res*

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particular, commentators have suggested that the savings in judicial time and resources from the application of administrative estoppel principles should be outweighed by the plaintiff's interest in obtaining a judicial forum for vindication of his or her federal claims.[7]

While the Ninth Circuit's decision in *Papai* does not expressly refer to these criticisms of administrative estoppel, the Court's decision demonstrates a reluctance to apply estoppel principles to bar a plaintiff from relitigating issues decided by an administrative body.

As noted above, the Supreme Court has held that final administrative agency decisions are entitled to collateral estoppel effect if specified conditions are met, absent legislative intent to the contrary. *See Solimino*, 501 U.S. 104. In *Solimino*, the Supreme Court recognized that the presumption of administrative estoppel should apply except "'when a statutory purpose to the contrary is evident.'" 501 U.S. at 108, quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952). The Supreme Court declined to require that Congress "state precisely any intention to overcome the presumption's application to a given statutory scheme," stating that the presumption should apply "where Congress has failed expressly or impliedly to evince any intention on the issue." *Solimino*, 501 U.S. 104, 108, 110.

While *Solimino* makes clear that Congress need not "state precisely" its intention to overcome the presumption of administrative estoppel, the Supreme Court did not decide in *Solimino* what quantum of legislative intent is necessary for a

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judicata principles should apply to administrative agency determinations made in a judicial capacity, *see* Kenneth C. Davis, 4 *Administrative Law Treatise* (2d Ed. 1983), § 21:3, at 53.

7. *See* Perschbacher, at 450; Silver, at 369.

court to find that Congress intended to overcome this presumption. It was not necessary for the Supreme Court to decide this question, since it found that the statute at issue in *Solimino* contained provisions which "make clear that collateral estoppel is not to apply." 501 U.S. 104, 110-11.

In *Papai*, the Ninth Circuit has identified this legislative intent in a manner that will minimize the application of collateral estoppel to issues raised in prior administrative proceedings, and is inconsistent with the approach taken by other Circuits. Specifically, the Ninth Circuit has adopted an approach under which courts have broad discretion to identify congressional intent to overcome the presumption of administrative collateral estoppel.

The requirements for applying administrative collateral estoppel were met in *Papai*. The Ninth Circuit in *Figueroa v. Campbell*, 45 F.3d 311 (9th Cir. 1995), set forth the requirements for collateral estoppel in a seaman status context: (1) the issue at stake must be identical to the one alleged in the prior litigation; (2) the issue must be actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation must be a critical and necessary part of the judgment in the earlier action.[8]

These requirements were met in *Papai:* (1) The question of seaman/non-seaman status, which is the same issue that would be presented to a jury in this case, was presented to the ALJ; (2) The issue was actually litigated in the administrative proceeding; (3) Determination of the issue by the ALJ was

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8. Since the record in *Figueroa* did not reflect an express finding by an ALJ or any other administrator that Figueroa was not a seaman, collateral estoppel was held inapplicable to the facts in that case. In this regard, *Figueroa* is in conflict with the Fifth Circuit's decision in *Sharp*, which held that a final award of benefits under the LHWCA necessarily involves a finding that the claimant is not a seaman because the two statutory schemes are mutually exclusive. *See Sharp*, 973 F.2d 423, 426.

necessary since if Papai was a seaman, then he was not entitled to LHWCA benefits. In addition, the *Solimino* standard for applying collateral estoppel to agency determinations was met, since the ALJ was acting in a judicial capacity and resolved a disputed issue of fact (Papai's seaman status) which the parties litigated. Thus the Ninth Circuit in Papai's case was squarely faced with the issue of whether the ALJ's determination of Papai's status should be given preclusive effect.

In its decision, the Ninth Circuit did not contend that any element of administrative collateral estoppel was absent, but rather avoided this issue by identifying policy reasons for allowing a plaintiff to pursue seaman remedies notwithstanding an earlier ALJ finding that the plaintiff was not a seaman. After expressing its concerns regarding the "fairness" of applying a bar to the Jones Act claim, the Ninth Circuit held that it was the "next logical step" to find that Congress intended to allow a plaintiff to seek seaman remedies even after the plaintiff had prevailed in a prior LHWCA proceeding. *Papai*, 67 F.3d at 208, Pet. App. p. 12a. The Court did not refer to particular statutory provisions or legislative history as justifying its conclusion that Congress intended to override the presumption of administrative collateral estoppel (other than referring to the LHWCA provision which prevents a double recovery). Rather, the Ninth Circuit's decision in *Papai* interprets *Solimino* to allow the presumption of administrative collateral estoppel to be overcome based on a court's view of the policy underlying the statute involved.

This approach to identifying Congressional intent is inconsistent with the approach in other Circuits, which have looked to the language and structure of the relevant statute and, if necessary, the statute's legislative history to determine whether Congress intended to overcome the presumption of administrative collateral estoppel. *See East Food & Liquor, Inc. v. United States*, 50 F.3d 1405, 1411 (7th Cir. 1995) (neither the "plain language" of the statute nor its purpose demonstrated that

Congress intended to overcome the presumption of administrative collateral estoppel); *JSK By and Through JK and PGK v. Hendry County School Board*, 941 F.2d 1563 (11th Cir. 1991) (language and legislative history of statute demonstrated that Congress intended to overcome the preclusive effect of agency action); *DeCintio v. Westchester County Medical Center*, 821 F.2d 111, 118 n.13 (2nd Cir. 1987) ("nothing in the statutory language" demonstrated Congressional intent to overcome collateral estoppel principles).

This conflict reflects a broader issue regarding appropriate techniques of statutory interpretation. The Ninth Circuit's approach to interpreting the statutory scheme in *Papai* allows courts significant discretion in identifying Congressional intent based on their understanding of the statutory policy, while the decisions in other Circuits take an approach that hews more closely to particular statutory provisions enacted by Congress. The Supreme Court has repeatedly warned that:

> [N]o legislation pursues its purposes at all costs. Deciding whether competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice — and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

Rodriguez v. United States, 480 U.S. 522, 525-26 (1987) (per curiam) (emphasis in original); *PBGC v. LTV Corp.*, 496 U.S. 633, 646-47 (1990); *Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986). The Ninth Circuit identified congressional intent through its own construction of the broad objective of the statute, a task of which courts should always be wary, and particularly so when the issue is whether Congress

intended to overcome a common-law presumption.[9]

If the Ninth Circuit maintains its current approach, and if other Circuits follow its lead, the presumption of administrative estoppel would be seriously weakened in cases involving statutory remedies. The Supreme Court has said that the presumption of administrative collateral estoppel serves important values, namely "the parties' interest in avoiding the cost and vexation of repetitive litigation and the public's interest in conserving judicial resources." *Elliott*, 478 U.S. 788, 798. By allowing this presumption to be overcome simply on the basis of a court's understanding of a statute's general policy, the Ninth Circuit's decision greatly restricts parties' ability to rely on the presumption in cases involving statutory remedies and will lead to an increase in litigation over whether Congress intended to overcome the presumption, thereby vitiating the original purpose of the presumption to conserve judicial resources.

The Supreme Court should resolve this uncertainty regarding the showing of legislative intent needed to overcome the presumption of administrative estoppel. This administrative law issue has importance beyond the maritime context presented here. It potentially affects any proceedings brought pursuant to a statutory scheme which contemplates separate administrative and judicial determinations. Given the broader importance of this issue to administrative law, the Supreme Court should set out a clear approach to guide the lower courts.

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9. For instance, even assuming that Congress' broad objective was to protect injured employees, this policy could lead to different conclusions as to whether to overcome the presumption of administrative collateral estoppel. As noted by the Fifth Circuit in *Fontenot*, allowing inconsistent coverage determinations could result in an LHWCA determination that a worker was a seaman (hence denying recovery) and a Jones Act determination that the worker was not a seaman (hence denying recovery). 923 F.2d at 1133 n.39. Thus, assuming that Congress primarily intended to protect injured employees, this purpose does not support the conclusion that Congress intended to overcome the presumption of administrative collateral estoppel.

II. THIS COURT SHOULD RESOLVE A SEPARATE CONFLICT AMONG THE CIRCUITS ABOUT WHETHER A CLAIMANT'S SEAMAN STATUS SHOULD BE BASED UPON HIS ENTIRE WORK HISTORY WITH ALL HIS EMPLOYERS OR HIS WORK HISTORY WITH HIS EMPLOYER AT THE TIME OF INJURY.

The Ninth Circuit's majority opinion (Judge Poole dissenting) contradicts the authority of the Fifth Circuit and the Third Circuit by allowing a claimant's status as a seaman or not to be determined by his work history with all his employers, not just with the employer for whom he was working when he was injured. The Ninth Circuit opinion states that the standard to be used in determining seaman status shall be:

> In short, all the circumstances surrounding the work performed by plaintiff for defendant as a deckhand prior to (and after, if any) the accident, as well as work performed for other employers during the relevant time should be considered in making the determination. [67 F.3d at 206, Pet. App. p. 8a.]

This standard departs from precedent in extending the scope of the seaman status inquiry to work performed after the accident. However, the most clear conflict that the Ninth Circuit standard creates with other Circuits is its directive that the seaman status inquiry can now include the claimant's work for *all* his employers "during the relevant time" (a phrase that the Ninth Circuit opinion does not define or explain). Such a standard conflicts with prevailing authority in the Fifth Circuit and Third Circuit.

A. The Ninth Circuit Decision Contradicts The Fleet Seaman Doctrine Prevailing In Other Circuits.

Chandris requires (as had prior law) that to be a seaman a claimant must have "a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature." 115 S.Ct. 2172, 2190.

The question presented is whether the claimant's connection must be to a group of vessels operated by the same employer, or to a broader group of vessels, such as all the vessels upon which the claimant has worked during the "relevant time." This issue arises when a maritime worker is not attached to one particular vessel but performs work on a number of different vessels, to none of which he has a "permanent" or even "substantial" connection.

To answer this question, the Fifth Circuit has developed the "Fleet Seaman Doctrine." That Doctrine holds that a claimant may be a seaman, even if he does not have a permanent or substantial connection to the vessel on which he was injured, so long as he had a permanent or substantial connection to a fleet of vessels *under common ownership or control.*

> By fleet we mean an identifiable group of vessels acting together or under one control. We reject the notion that fleet of vessels in this context means any group of vessels an employee happens to work aboard. Unless fleet is given its ordinary meaning, the fundamental distinction between members of a crew and transitory maritime workers such as longshoremen is totally obliterated.

Barrett v. Chevron, U.S.A. Inc., 781 F.2d 1067, 1074 (5th Cir. 1986, en banc). *Accord Bach v. Trident Steamship Co., Inc.*, 920 F.2d 322, 324 (5th Cir. 1991), *vacated and remanded*, 500 U.S.

949, *reinstated on remand*, 947 F.2d 1290 (5th Cir. 1991); *Campo v. Electro-Coal Transfer Corp.* 970 F.2d 51, 52 (5th Cir. 1992).

The Third Circuit, finding the Fleet Seaman Doctrine to be a reasonable extension of Supreme Court precedent, adopted the Doctrine in *Reeves v. Mobile Dredging & Pumping Co., Inc.*, 26 F.3d 1247, 1256 (3d Cir. 1994). The Third Circuit also adopted the rule that the "fleet" to be considered is that of the claimant's employer when the claimant was injured.

> The key to the Fleet Seaman Doctrine is that the seaman maintain the employment relationship with the same employer. The term "fleet" refers to the fleet of vessels owned by the employer, not the fleet of vessels on which the employee has worked. [26 F.3d at 1256.]
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> * * *
>
> We agree with the en banc opinion in Barrett, that a fleet is an identifiable group of vessels acting together or under one control . . . The case law uniformly rejects the claim that "fleet" means any group of vessels an employee happens to work aboard. [26 F.3d at 1257-8.]

Conversely, the Ninth Circuit's opinion in this case allows (indeed compels) a review of the claimant's work on vessels of all his employers during the "relevant time".

B. The Ninth Circuit's Decision Is Based On A Misreading Of Dictum In The Supreme Court's Opinion In *Chandris v. Latsis.*

The Ninth Circuit's decision on this point is based upon a misreading of the following sentence of dictum in *Chandris:*

"'On the other hand, we see no reason to limit the seaman status inquiry, as petitioners contend, exclusively to an examination of the overall course of a worker's service with a particular employer.'" 67 F.3d at 206, Pet. App. p. 7a, quoting *Chandris*, 115 S.Ct. at 2191. That portion of the *Chandris* opinion was addressing the need in some cases to judge the claimant's connection to a vessel or fleet of vessels not on the overall course of the claimant's work history with the employer who operates the vessel on which the claimant is injured, but on the claimant's current assignment with that employer. For instance, the Supreme Court stated, someone who worked for years in an employer's shoreside headquarters but who is then reassigned to a ship in a classic seaman's job and is injured shortly after the reassignment is a seaman. Conversely, said the Court, someone who is transferred to a desk job in the company's office and who is injured in the hallway is not entitled to seaman status on the basis of prior service at sea. *Id.*, 115 S.Ct. at 2191.

It was in this context that the Supreme Court stated that it sees "no reason to limit the seaman status inquiry ... exclusively to an examination of the overall course of a worker's service with a particular employer." The key words in this sentence are "overall course," not "particular employer." This sentence was intended to narrow the seaman status inquiry to the material part of the claimant's work history with a particular employer. The Ninth Circuit's opinion turns the sentence upside down and interprets it as an instruction to greatly expand the seaman status inquiry by including the claimant's work with all his employers. That decision puts the Ninth Circuit in clear conflict with the Fifth Circuit and Third Circuit.

C. The Court Should Resolve The Conflict Among The Circuits About Whether Seaman Status Should Be Based Upon A Claimant's Work History With All His Employers.

One of the few certain elements of the seaman status test

over the years has been that the claimant's status was to be determined relative to the particular employer for whom he was working when he was injured. The Fleet Seaman Doctrine extended the analysis — where appropriate — to include the claimant's work on all the vessels of his employer, not just the vessel involved in the accident. The Ninth Circuit's opinion now puts the claimant's entire work history for all employers into play when determining seaman status. This approach creates the possibility that if an employer hires a worker to do desk work, and the worker suffers an injury, the employer will be subject to the lenient Jones Act negligence standard simply because — unbeknownst to the employer — the worker had previously worked as a seaman for other employers.

The Ninth Circuit's opinion, by removing the limits of the Fleet Seaman Doctrine, does what the Fifth Circuit in *Barrett* expressly sought to avoid: it "totally obliterates" the fundamental distinction between members of a crew and transitory maritime workers such as longshoremen. Certainly the conflict between the Circuits will lead to inconsistent results on seaman status in the different Circuits.

CONCLUSION

For the foregoing reasons, HTB's Petition for a Writ of Certiorari should be granted.

Dated: April 9, 1996

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED SEPTEMBER 25, 1995

John PAPAI, Joanna Papai,
Plaintiffs-Appellants,

HARBOR TUG AND BARGE COMPANY,
Defendant-Appellee.

No. 93-15132.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 9, 1994.

Decided Sept. 25, 1995.

* * *

Thomas J. Boyle, Law Offices of Thomas J. Boyle, San Francisco, CA, for plaintiffs-appellants.

Eric Danoff, Graham & James, San Francisco, CA, for defendant-appellee.

Appeal from the United States District Court for the Northern District of California.

Before: POOLE and REINHARDT, Circuit Judges, and TAKASUGI,[1] District Judge.

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1. Honorable Robert M. Takasugi, United States District Judge for the Central District of California, sitting by designation.

Appendix A

Opinion by Judge TAKASUGI; Dissent by Judge POOLE.

TAKASUGI, District Judge:

This case arises from a knee injury sustained by plaintiff John Papai while in the course and scope of his employment for defendant Harbor Tug and Barge Company on board the tug *Point Barrow*. Plaintiff appeals the granting of a partial summary judgment and a subsequent judgment for the defendant after a court trial. Because we hold that summary judgment was granted in error, we do not reach plaintiffs challenge to the court's findings made at trial.

This appeal raises two issues:

1. What factors are relevant to the determination of seaman status under the Jones Act, 46 U.S.C App. §§ 688, *et seq.*, in terms of the requirement that the claimant have a substantial connection with the vessel; and

2. Whether plaintiff's receipt of compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA") precludes him from also recovering as a seaman under the Jones Act.

I. BACKGROUND

A. Facts[2]

Plaintiff worked at various maritime related jobs for various

2. Because this is an appeal from the grant of summary judgment in favor of the defendant, the issue is whether genuine issues of material fact were remaining such that the grant of summary judgment was in error. As such, the (Cont'd)

Appendix A

companies and obtained his maritime jobs through the hiring hall of the Inland Boatman's Union of the Pacific ("IBU"). He was not a permanent employee of defendant. Defendant along with other companies is a party to a Deckhands Agreement with the IBU pursuant to which the vessels obtain their deckhands through the union. Apparently, there was no permanent crew on any of the vessels and assignments were made on a day-to-day basis.

Plaintiff had worked for defendant as a deckhand on twelve previous occasions in 1989, and on March 13, 1989, plaintiff was dispatched by the IBU hiring hall to perform maintenance for one day on defendant's tug *Point Barrow*, under the supervision of defendant's Port Captain.

Plaintiff was injured when he fell from a ladder while painting the vessel.

B. Procedural History

In January 1990, plaintiff John Papai filed his complaint against defendant Harbor Tug and Barge seeking damages under the Jones Act, 46 U.S.C.App. §§ 688, *et seq.*, and for unseaworthiness under general maritime law. His wife, plaintiff Joanna Papai, sued for loss of consortium.

Defendant moved for summary judgment on the ground that

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facts relevant on appeal are not limited to those established and undisputed below but, rather, also include those facts that were sufficiently supported by evidence to raise a genuine issue of their existence. Accordingly, the facts discussed herein include both those that were established and undisputed below as well as those that were sufficiently supported by evidence to be considered in dispute.

plaintiff John Papai was not a seaman within the meaning of the Jones Act and general maritime law. The district court granted the motion on May 29, 1990.

Pursuant to leave of court, plaintiffs filed a first amended complaint under Section Five of the LHWCA and for loss of consortium.

In denying reconsideration on the summary judgment, the court certified the question under 28 U.S.C. § 1292(b) for interlocutory appeal, which was denied by the Ninth Circuit on October 30, 1990. The subject was then rebriefed and reargued to the district court in light of two recent Supreme Court decisions (*McDermott International, Inc. v. Wilander,* 498 U.S. 337,111 S.Ct. 807, 112 L.Ed.2d 866 (1991); *Southwest Marine, Inc. v. Gizoni,* 502 U.S. 81, 112 S.Ct. 486, 116 L.Ed.2d 405 (1991)), and the district court reaffirmed that plaintiff was not a seaman on the basis that he did not have the necessary permanent connection with the vessel.

After the district court granted summary judgment on plaintiff's Jones Act claim on May 29, 1990, plaintiff filed a compensation claim under the LHWCA against defendant as his employer. On June 2, 1992, a hearing was held before an Administrative Law Judge. The ALJ issued a written Decision and Order in favor of compensation for plaintiff on August 27, 1992. The August 27, 1992, Decision and Order was not appealed and is, thus, final.

After a court trial in the matter before the district court, judgment was entered in favor of defendant and against plaintiffs on December 29, 1992. Plaintiffs filed their notice of appeal on January 20, 1993 challenging the district court's grant of

summary judgment on the Jones Act claim and the judgment rendered after the court trial on the claim under Section Five of the LHWCA and common law negligence. This court holds that it was error to grant summary judgment on plaintiff's Jones Act claim and that said claim is not rendered moot by reason of plaintiff's receipt of compensation benefits under the LHWCA.

II. JURISDICTION

This court has subject matter jurisdiction pursuant to 28 U.S.C. § 1291.

III. DISCUSSION

A. Seaman Status Under the Jones Act

Seaman status, which is required for recovery under the Jones Act, is a mixed question of law and fact. Nevertheless, it may be determined by summary judgment in appropriate circumstances. *Wilander,* 498 U.S. at 355-56, 111 S.Ct. at 817-18.

Formulation of the seaman status test was recently addressed by the Supreme Court in *Chandris, Inc. v. Latsis,* __ U.S. __, 115 S.Ct. 2172, 132 L.Ed.2d 314 (1995):

> [W]e think that the essential requirements for seaman status are twofold. First, as we emphasized in *Wilander,* "an employee's duties must contribut[e] to the function of the vessel or to the accomplishment of its mission." . . .
>
> Second, and most important for our

purposes here, a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature.

* * * * * *

In our views, "the total circumstances of an individual's employment must be weighed to determine whether he had a sufficient relation to the navigation of vessels and the perils attendant thereon." [Citation.] The duration of a worker's connection to a vessel and the nature of the worker's activities, taken together, determine whether a maritime employee is a seaman because the ultimate inquiry is whether the worker in question is a member of the vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time.

* * * * * *

[S]eaman status is not *merely* a temporal concept, but we also believe that it necessarily includes a temporal element. A maritime worker who spends only a small action of his working time on board a vessel is fundamentally land-based and therefore not a member of the vessel's crews, regardless of what his duties are. Naturally, substantiality in this context is determined by reference to

> the period covered by the Jones Act plaintiff's maritime employment, rather than by some absolute measure.

Id. at 2191.

Thus, the inquiry is not whether plaintiff had a permanent connection with the vessel. The proper inquiry is whether plaintiff's relationship with a vessel (or group of vessels) was substantial in terms of duration and nature, which requires consideration of the total circumstances of his employment. Scrutiny of the "total circumstances" is, necessarily, fact specific. On one hand, the status of a worker may change by a change in work assignment. One the other hand, it may be necessary to examine the work performed by the employee while employed by different employers during the relevant time period. As was stated by the Supreme Court in *Chandris:*

> [W]e see no reason to limit the seaman status inquiry . . . exclusively to an examination of the overall course of a worker's service with a particular employer. . . . When a maritime worker's basic assignment changes, his seaman status may change as well. . . . If a maritime employee receives a new work assignment in which his essential duties are changed, he is entitled to have the assessment of the substantiality of his vessel-related work made on the basis of his activities in his new position.

Id. at 2191-92.

There would appear to be no reason that a group of employers who join together to obtain a common labor pool on which they draw by means of a union hiring hall (in this case, the Inland Boatman's Union hiring hall), should not be treated as a common employer for purposes of determining a maritime worker's seaman status. If the type of work a maritime worker customarily performs would entitle him to seaman status if performed for a single employer, the worker should not be deprived of that status simply because the industry operates under a daily assignment rather than a permanent employment system.[3] Under such circumstances, a maritime worker who regularly performs seaman's work is entitled to seaman status. Moreover, in the case before us, the plaintiff actually worked for Harbor Tug and Barge Company on far more than a single occasion. As we have noted earlier, he worked for that company on a dozen occasions over the two and a half month period preceding his injury. This circumstance may in itself provide a sufficient connection.

In short, all the circumstances surrounding the work performed by plaintiff for defendant as a deckhand prior to (and after, if any) the accident, as well as work performed for other employers during the relevant time should be considered in making the determination.

It was error for the District Court to have granted summary

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3. Under the dissent's view, a master, mate, or pilot who works on tug boats every day is not a seaman simply because he receives his assignments through a hiring hall from which a group of vessels have collectively agreed to obtain employees and he may be assigned to different vessels on a daily or weekly basis. We simply do not read the "group of vessels" doctrine so narrowly. In any event, the plaintiff in this case worked a substantial period of time for a particular vessel owner.

judgment on plaintiff's Jones Act claim since issues of fact remained as to plaintiff's connection with the vessel.[4]

B. Effect of Receiving LHWCA Benefits on Seaman Status

Given that the Jones Act and the LHWCA are mutually exclusive, the issue arises whether plaintiff's receipt of benefits under the LHWCA precludes him from being a seaman under the Jones Act.[5]

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4. The negligence issue will therefore be decided under the Jones Act, which applies a standard more favorable to the claimant, *see Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 523, 77 S.Ct. 457, 458, 1 L.Ed.2d 511(1957) (the defendant is liable if "even the slightest" negligence on the defendant's part caused the claimant's injury), and is a question for the jury to decide. *See id.* at 523-24, 77 S.Ct. at 458.

5. We take judicial notice of the August 27, 1992, Decision and Order of the ALJ. Defendant has supplied us with a copy and requests that we take judicial notice of said ruling pursuant to Rule 201 of the Federal Rules of Evidence. Although plaintiff disputes the propriety of taking judicial notice, he does not dispute that the ALJ issued the August 27, 1992, Decision and Order in his LHWCA compensation claim case and that the document supplied by defendant is a true copy thereof. Rule 201 provides for judicial notice of adjudicative facts that are, *inter alia*, "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Such "[j]udicial notice may be taken at any stage of the proceeding," (Rule 201(f)) including on appeal (*United States v. Gonzalez*, 442 F.2d 698, 707 (2d Cir. 1970). certiorari denied 404 U.S. 845, 92 S.Ct. 146. 30 LEd.2d 81 (1971); *Sinaloa Lake Owners Association v. City of Simi Valley*, 882 F.2d 1398, 1403 n. 2 (9th Cir.1989), certiorari denied, 494 U.S. 1016, 110 S.Ct. 1317, 108 L.Ed.2d 493 (1990); *Bryant v. Carleson*, 444 F.2d 353, 357-8 (9th Cir.), certiorari denied 404 U.S. 967, 92 S.Ct. 344, 30 L.Ed.2d 287 (1971)); and is mandatory "if requested by a party and [the court is] supplied with the necessary information." Rule 201(d).

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> It is by now 'universally accepted' that an employee who receives voluntary payments under the LHWCA without a formal award is not barred from subsequently seeking relief under the Jones Act. [Citations omitted.]

Southwest Marine, Inc. v. Gizoni, 502 U.S. 81, 90-92, 112 S.Ct. 486, 493-94.

The distinction between *Gizoni* and the case at bar is that here plaintiff's LHWCA claim was fully adjudicated before the ALJ who rendered a final decision. That the LHWCA claim was never actually litigated was the basis for the *Gizoni* Court's holding that receipt of LHWCA benefits did not automatically preclude subsequent litigation under the Jones Act. However, the Court went on to recognize further support for its holding, which is applicable here: "Moreover, the LHWCA clearly does not comprehend such a preclusive effect, as it specifically provides that any amounts paid to an employee for the same injury, disability, or death pursuant to the Jones Act shall be credited against any liability imposed by the LHWCA" *Id.*, at 91-92, 112

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Judicial notice is properly taken of orders and decisions made by other courts or administrative agencies. *Bryant v. Carleson, supra; Assembly of State of California v. U.S. Department of Commerce*, 797 F.Supp. 1554, 1558-59 (E.D.Cal.), affirmed 968 F.2d 916 (9th Cir.1992); *Missouri Pacific Railroad Company v. United Transportation Union, General Committee of Adjustment*, 580 F.Supp. 1490 (E.D.Mo.1984), affirmed 782 F.2d 107 (8th Cir. 1986), certiorari denied 482 U.S. 927, 107 S.Ct. 3209, 96 L.Ed.2d 696 (1987).

Plaintiffs request for an opportunity to be heard on the propriety of taking judicial notice pursuant to Rule 201(e) has been sufficiently satisfied in that he has had the opportunity to address the matter in his reply brief and at oral argument.

S.Ct. at 494. The Supreme Court further stated in a footnote addressing an equitable estoppel argument made by an amicus brief, "[w]here full compensation credit removes the threat of double recovery, the critical element of detrimental reliance does not appear. [Citations omitted.] Argument by amicus would force injured maritime workers to an election of remedies we do not believe Congress to have intended." *Id.*, at 92, n. 5, 112 S.Ct. at 494, n. 5.

In determining whether the prior litigation of plaintiff's LHWCA claim bars his subsequent Jones Act claim, we are mindful of the reasoning expressed by the *Gizoni* Court and are further concerned with the fairness in imposing such a bar where it could work a disincentive on the part of the employer to vigorously litigate its defense in the LHWCA action. This is so because the parties are on the opposite sides of the seaman issue under the LHWCA as compared with their positions under the Jones Act. Futhermore, imposing such a bar would result in subjecting to suit an employer who immediately and voluntarily begins compensation payments while immunizing from suit an employer who forces his employee to seek compensation through litigation.

As was recognized in *The Law of Admiralty*,

> The provision of compensation during [the] period [a Jones Act action is pending,] would serve the function of the traditional maritime remedy of maintenance and cure (which has always been thought of as supplemental to the damage recovery). It is only because of a series of accidents in our legal history that the payment of medical expenses and a

> living allowance to an injured worker is thought to be entirely consistent with his damage recovery if the payment is called maintenance and cure but inconsistent with the damage recovery if it is called compensation.

Grant Gilmore & Charles L. Black Jr., *The Law of Admiralty* 435 (2d ed. 1975).

Recognizing that a bar to relitigation would not serve the purpose for which it is usually employed since the parties are forced to take inconsistent positions under the Jones Act and the LHWCA and extending the reasoning of the *Gizoni* Court to the next logical step, we hold that plaintiff's litigation of his LHWCA claim does not bar his subsequent Jones Act claim.[6]

IV. CONCLUSION

Granting summary judgment on plaintiff's Jones Act claim was error. The determination of seaman status under the Jones Act involves consideration of both the duration and nature of the plaintiff's connection to the vessel, which necessitates an inquiry into all of the facts surrounding the plaintiff's employment. Furthermore, plaintiff's pursuit of his compensation claim under the LHWCA does not render his Jones Act claim moot. Accordingly, the grant of partial summary judgment on plaintiff's Jones Act claim is reversed and this matter is remanded for further proceedings consistent herewith.

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6. *Figueroa v. Campbell Industries*, 45 F.3d 311 (9th Cir.1995), which involved a maritime worker whose LHWCA claim was compromised and settled before a Jones Act action was filed, reached he same result for different reasons.

POOLE, Circuit Judge, dissenting:

Because I cannot agree with my colleagues' construction of *Chandris, Inc. v. Latsis*, __ U.S. __, 115 S.Ct. 2172, 132 L.Ed.2d 314 (1995), as it applies to this case, I respectfully dissent.

This case hinges on the construction of the "connection to a vessel" requirement for defining seamen under the Jones Act. We are blessed to have as an aid a recent Delphic pronouncement, the Supreme Court's decision in *Chandris*. As the majority reads *Chandris*, "[t]he proper inquiry is whether plaintiff's relationship with a vessel (or group of vessels) was substantial in terms of duration and nature, which requires consideration of the total circumstances of his employment." *See supra* at 206. So far, so good. We agree over what *relationhsip* a seaman must have — a relationship substantial in both duration and nature.

But with what must a seaman have that relationship? It is here I believe my colleagues have sailed off course. Relying on *Chandris*, the majority concludes that "it may be necessary to examine the work performed by the employee while employed by different employers during the relevant time period." *See supra* at 206. In one stroke, perhaps without even fully realizing it, the majority vitiates the "connection to a vessel" requirement.

I

The line between LHWCA coverage and Jones Act coverage recognizes "the fundamental distinction between land-based and sea-based maritime employees." *Chandris*, __ U.S. at __, 115 S.Ct. at 2185. "The latter, who owe their allegiance to a vessel and not solely to a land-based employer, are seamen." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 347, 111 S.Ct.

807, 813,112 L.Ed.2d 866 (1991). While all those who do the ship's work are eligible for seaman's status, the vessel connection requirement serves the critical function of "separat[ing] the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea." *Chandris*, __U.S. at __, 115 S.Ct. at 2190.

It is not necessary that a seaman have allegiance only to a single vessel. Thirty-five years ago, the Fifth Circuit, the leading circuit on admiralty law, recognized that the Jones Act could still apply to a maritime worker who was " 'assigned permanently to' several specific vessels 'or perform(s) a substantial part of his work on the' several specified 'vessel(s).' " *Braniff v. Jackson Ave.-Gretna Ferry, Inc.*, 280 F.2d 523, 528 (5th Cir.1960) (quoting *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir.1959)). "Under the fleet doctrine, one can acquire 'seaman' status through permanent assignment to a group of vessels under common ownership or control." *Gizoni v. Southwest Marine, Inc.*, 56 F.3d 1138, 1141 (9th Cir.1995). The Fifth Circuit's "fleet doctrine" is now the law of this circuit; we recently expressly adopted it in *Gizoni*. *Id.*

In my view, *Chandris* approves of and adopts the fleet doctrine as well. After canvassing the circuit courts' law and discussing the fleet doctrine with approval, __ U.S. at __, 115 S.Ct. at 2189, *Chandris* requires that "a seaman must have a connection to a vessel in navigation (*or to an identifiable group of such vessels*) . . ." __ U.S. __, 115 S.Ct. at 2190 (emphasis added). This is exactly how the Fifth Circuit has phrased the doctrine: "The key is that there must be a relationship between

the claimant and a specific vessel or identifiable group of vessels." *Guidry v. Continental Oil Co.*, 640 F.2d 523, 529 (5th Cir.1981). Thus, according to the Supreme Court, a seaman need not owe allegiance to a single vessel; it is enough that he is substantially connected to "an identifiable group." Although *Gizoni* did not use the precise "identifiable group" language in adopting the Fifth Circuit's fleet doctrine, it presumably incorporated the same concepts. *See Gizoni*, 56 F.3d at 1141 (interpreting fleet doctrine as requiring permanent assignment to a group of vessels under common ownership or control, and citing several Fifth Circuit cases with approval).

In the majority's view, however, that group may be identified simply as those vessels on which a sailor sails, not just those of a particular employer or controlling entity. *See supra* at 206 ("[A]ll the circumstances surrounding the work performed by plaintiff for defendant . . . as well as work performed for other employers during the relevant time should be considered in making the [seaman] determination."). This renders the "identifiable group" or "fleet" requirement a nullity. The majority's position has been expressly rejected by each of the other circuits which have adopted the fleet doctrine:

> By fleet we mean an identifiable group of vessels acting together or under one control. We reject the notion that fleet of vessels in this context means any group of vessels an employee happens to work aboard. Unless fleet is given its ordinary meaning, the fundamental distinction between members of a crew and transitory maritime workers such as longshoremen is totally obliterated.

Barrett v. Chevron, U.S.A., Inc., 781 F.2d 1067 (5th Cir.1986) (en banc) (footnote omitted); *accord Bach v. Trident Steamship Co.*, 920 F.2d 322, 324 (5th Cir.), *vacated and remanded*, 500 U.S. 949, 111 S.Ct. 2253, 114 L.Ed.2d 706 *reaff'd on remand*, 947 F.2d 1290 (5th Cir.1991).

> The key to the Fleet Seaman Doctrine is that the seaman maintain the employment relationship with the same employer. The term 'fleet' refers to the fleet of vessels owned by the employer, not the fleet of vessels on which the employee has worked.

Reeves v. Mobile Dredging & Pumping Co., 26 F.3d 1247, 1256 (3d Cir.1994).[1]

What inspires this departure? The following language from *Chandris*, which elsewhere clearly endorses the fleet doctrine: "On the other hand, we see no reason to limit the seaman status inquiry, as petitioners contend, exclusively to an examination of the overall course of a worker's service with a particular employer." __ U.S. at __, 115 S.Ct. at 2191. But as that opinion's subsequent discussion makes clear, the emphasis in this statement is on the words "overall course," not "particular employer." *Chandris* goes on to discuss the fact that it may sometimes be necessary to judge connection based not on the

1. Moreover, our recent decision in *Gizoni* cites with approval the Fifth Circuit's description of its fleet doctrine in *Campo v. Electro-Coal Transfer Corp.*, 970 F.2d 51, 52 (5th Cir.1992). *Gizoni*, 56 F.3d at 1141. In explaining the fleet doctrine, *Campo* expressly rejects the approach the majority takes today. *Campo*, 970 F.2d at 52 (" 'We reject the notion that [a] fleet of vessels in this context means any group of vessels an employee happens to work aboard.' " (quoting *Barrett*, 781 F.2d at 1074)).

overall course of an employee's work with an employer, but based only on her latest or current assignment with that employer. *Id.* at __ - __, 115 S.Ct. at 2191-92.

In short, nothing in *Chandris'* language permits us to abandon the requirement that a Jones Act seaman be substantially connected to, at the least, "an identifiable group" of vessels. *Id.* at __, 115 S.Ct. at 2190. By so doing, we "totally obliterate[ ]" "the fundamental distinction between members of a crew and transitory maritime workers." *Barnett*, 781 F.2d at 1074.

II

Applying the proper fleet requirement, I cannot agree that the district court erred in granting summary judgment on Papai's Jones Act claim. The district court did not explain its reasoning, but in my view, the ALJ who decided Papai's LHWCA claim had it right:

> Although some of the work performed by the claimant is the type of work that might be performed by a member of a ship's crew, the evidence also clearly indicates that at the time of the claimant's injury he was a "land-based" worker and therefore is entitled to seek a remedy for his injury under the Longshore Act [and prohibited from seeking a remedy under the Jones Act]. For example, the claimant's testimony indicates that all of his jobs were obtained by going to a union hiring hall on a daily basis and waiting to be assigned work according to seniority. Tr. at

33. The claimant's testimony also indicates that none of his jobs lasted more than two or three days at a time, and that, as a result, he had a variety of different employers and worked on a variety of different ships. Tr. at 32, 33 and CX 16-18. Since the claimant was not assigned to work on any particular ship, he lived on the shore, not on a ship. Tr. at 33. Although the claimant had worked aboard the *P.T. Barrow* before the date on which he was injured, the job the claimant was performing at the time of his injury was of only one day's duration. Tr. at 31, 66. It is obvious from these facts that the claimant's assignment to any particular vessel or fleet of vessels was random, sporadic and transitory. Given this lack of any permanent connection to any vessel or fleet of vessels, it necessarily follows that the claimant cannot be considered as a member of the crew of any ship or fleet of ships [and thus, not a seaman].

ALJ 8/27/92 Order at 5. Seaman's status is a mixed question of law and fact, but "summary judgment or a directed verdict is mandated where the facts and the law will reasonably support only one conclusion." *Wilander,* 498 U.S. at 356, 111 S.Ct. at 818. This is such a case. Because Papai's contact with any vessel or vessels could only be described as "transitory or sporadic," *Chandris,* __ U.S. at __, 115 S.Ct. at 2190, the district court correctly determined that Papai was not a seaman as a matter of law.

As the Supreme Court has explained, "Traditional seaman's

remedies . . . have been 'universally recognized as . . . growing out of the status of the seaman and his peculiar relationship to the vessel and as a feature of the maritime law compensating or offsetting the special hazards and disadvantages to which they who go down to the sea in ships are subjected.'. . . . It is this distinction that Congress recognized in the LHWCA and the Jones Act." *Wilander,* 498 U.S. at 354, 111 S.Ct. at 817 (quoting *Seas Shipping Co. v. Sieracki,* 328 U.S. 85,104, 66 S.Ct. 872, 882, 90 L.Ed. 1099 (1946) (Stone, C.J., dissenting)). John Papai, who woke up in his own bed, arrived at the hiring hall to learn he was to paint the *Point Barrow* for a day, and was back in his own bed by night, cannot seriously be described as having that "peculiar relationship" with the *Point Barrow* or Harbor Tug's fleet so as to be entitled to Jones Act protection. Because the majority believes that peculiar relationship to be no longer required, I respectfully dissent.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED DECEMBER 12, 1995

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-15132
D.C. No. C-90-0111 CAL

JOHN PAPAI, JOANNA PAPAI

Plaintiffs-Appellants,

v.

HARBOR TUG AND BARGE COMPANY,

Defendant-Appellee.

ORDER

Before: POOLE, REINHARDT, Circuit Judges, and TAKASUGI.[1]

Judges Reinhardt and Takasugi have voted to deny the petition for rehearing. Judge Poole voted to grant the petition for rehearing. Judges Poole and Reinhardt have voted to reject the suggestion for rehearing en banc, and Judge Takasugi so recommends. The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a

1. Honorable Robert M. Takasugi, United States District Judge for the Central District of California, sitting by designation.

vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA FILED MAY 29, 1990

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-90-0111 CAL

ORDER GRANTING PARTIAL
SUMMARY JUDGMENT TO DEFENDANT
HARBOR TUG AND BARGE COMPANY

Date: May 18, 1990
Time: 9:30 a.m.

Courtroom: Judge Legge

JOHN PAPAI, JOANNA PAPAI,

Plaintiffs,

vs.

HARBOR TUG AND BARGE COMPANY,

Defendant.

Appendix C

Defendant HARBOR TUG AND BARGE COMPANY (HTB) filed a Motion for partial summary judgment that plaintiff JOHN PAPAI was not a "seaman" at the time of his accident and that therefore Plaintiffs cannot assert a cause of action against HTB under the Jones Act, 46 U.S.C. § 688, or under the general maritime law. Each party submitted Points and Authorities in connection with the motion. Oral argument on the motion was heard on May 18, 1990. Tom Boyle appeared for Plaintiffs, and Eric Danoff of Graham & James appeared for Defendant.

The Court, having considered all the papers submitted by the parties, as well as the oral argument presented at the hearing, finds that at the time of his accident plaintiff John Papai was not a seaman within the meaning of the Jones Act or the general maritime law, and that therefore Plaintiffs cannot assert a cause of action against defendant Harbor Tug and Barge Company under the Jones Act or under the general maritime law for damages or for maintenance and cure.

IT IS THEREFORE ORDERED that Plaintiffs' causes of action under the Jones Act and the general maritime law are dismissed with prejudice. This Order does not affect the causes of action, if any, that Plaintiffs may have under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et.seq.*, or for common law negligence. Plaintiffs are granted time through May 31, 1990, to amend their Complaint to allege such causes of action.

It is also ordered that a status conference in this case take place on June 8, 1990, at 11:00 a.m.

Dated: May 29, 1990.

CHARLES A. LEGGE
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHEN DISTRICT OF CALIFORNIA FILED AUGUST 21, 1990

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-90 0111 CAL

ORDER OF DENIAL OF RECONSIDERATION AND STATEMENT OF GROUNDS FOR IMMEDIATE APPEAL 28 U.S.C. §1292(b)

JOHN PAPAI, JOANNA PAPAI,

Plaintiffs,

v.

HARBOR TUG & BARGE CO., et al.,

Defendants.

Plaintiffs filed a motion for reconsideration of this Court's order of May 29, 1990, that their causes of action under the Jones'

Act and the general maritime law be dismissed. Oral argument on the motion was heard on August 3, 1990. Thomas Boyle appeared for the plaintiffs, and Eric Danoff of Graham and James appeared for defendant.

The Court remains convinced that plaintiff John Papai was not a seaman within the meaning of the Jones Act at the time of his injury.

IT IS THEREFORE ORDERED that the motion for reconsideration is denied and that plaintiffs causes of action under the Jones' Act and the general maritime law remain dismissed with prejudice.

The undersigned is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order as authorized by 28 U.S.C. §1292(b) may materially advance the ultimate termination of this litigation.

IT IS THEREFORE ORDERED that all proceedings herein be stayed for ten days from date of entry of this order. If, within such ten days, plaintiffs shall apply to the united States Court of Appeals for the Ninth Circuit for permission to appeal from this order, the proceedings herein shall be stayed pending determination of such application, or of the appeal, if it is allowed.

Dated: August 17, 1990.

CHARLES A. LEGGE
UNITED STATES DISTRICT JUDGE

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA FILED APRIL 6, 1992

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-90-0111 CAL

ORDER CONFIRMING SUMMARY ADJUDICATION THAT PLAINTIFF JOHN PAPAI WAS NOT A SEAMAN

Date: March 27, 1992
Time: 9:30 a.m.
Courtroom: Judge Legge

JOHN PAPAI, JOANNA PAPAI,

Plaintiffs,

v.

HARBOR TUG AND BARGE COMPANY,

Defendant.

Appendix E

Defendant HARBOR TUG AND BARGE COMPANY ("HTB") has filed a motion to confirm the Court's prior summary adjudication that at the time of his accident plaintiff JOHN PAPAI was not a "seaman" within the meaning of the Jones Act or the general maritime law. Each party submitted Points and Authorities in connection with the motion. Oral argument on the motion was heard on March 27, 1992.

The Court, having considered all the papers submitted by the parties, as well as the oral argument presented at the hearing, confirms its prior finding upon summary adjudication that, at the time of the accident in issue, plaintiff John Papai was not a seaman within the meaning of the Jones Act or the general maritime law, since he did not have a "more or less permanent connection" with the vessel on which he was injured nor did he perform substantial work on the vessel sufficient for seaman status.

DATED: APR -6 1992

CHARLES A. LEGGE
UNITED STATES DISTRICT JUDGE

APPENDIX F — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA FILED DECEMBER 28, 1992

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-90-0111 CAL

JUDGMENT IN FAVOR OF DEFENDANT
HARBOR TUG AND BARGE COMPANY

JOHN PAPAI, JOANNA PAPAI,

Plaintiff,

vs.

HARBOR TUG AND BARGE COMPANY,

Defendant.

ENTERED IN CIVIL DOCKET 12/29, 1992

This action came on for trial to the Court, Judge Charles A. Legge presiding, during the period August 31, 1992 through

Appendix F

September 17, 1992. The Court has heard the oral evidence and has reviewed the documentary evidence admitted at the trial, has read the pre-trial and post-trial briefs, and has heard the oral arguments of counsel presented on December 16, 1992. The Court having considered all the foregoing, and for the reasons stated on the record in open court on December 16, 1992:

IT IS HEREBY ORDERED that Judgment be entered in favor of defendant Harbor Tug and Barge Company and against plaintiffs John Papai and Joanna Papai. Plaintiffs' First Amended Complaint is to be dismissed with prejudice. Defendant Harbor Tug and Barge Company is awarded costs of suit.

Dated: 12/28, 1992

s/ Charles A. Legge
Charles A. Legge
U.S. District Judge

APPENDIX G — DECISION AND ORDER OF THE UNITED STATES DEPARTMENT OF LABOR DATED AUGUST 27, 1992

U.S. Department of Labor

Office of Administrative Law
211 Main Street — Suite 600
San Francisco, California 94105

Commercial (415) 744-6577
FAX (415) 744-6569
FTS 8 (415) 744-6577

CASE NO. 92-LHC-403

OWCP NO. 13-85230

In the Matter of

JOHN PAPAI,

Claimant,

v.

HARBOR TUG AND BARGE,

Employer,

and

CRAWFORD & COMPANY,

Insurer,

Appendix G

and

DIRECTOR, OWCP,

Party in Interest

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For the Claimant

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For the Employer/Insurer

George B. O'Haver, Esq.
United States Department of Labor
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San Francisco, California 94105

For the Director, OWCP

Before: Paul A. Mapes

Administrative Law Judge

Appendix G

DECISION AND ORDER — AWARDING BENEFITS

This case involves a claim arising under the Longshore and Harbor Workers' Compensation Act, as amended (hereinafter, the "Act" or the "Longshore Act"), 33 U.S.C. §901 *et seq*. A formal hearing was held in San Francisco, California, on June 2, 1992. Counsel for the claimant and counsel for the employer/carrier appeared at the hearing and the following exhibits were admitted into evidence: Claimant's Exhibits (CX) 1-6, and Employer/Carrier Exhibits (EX) 1-20. Counsel for the Director, OWCP, did not appear at the hearing, but did submit a pre-hearing statement. Following the hearing, the deposition of Dr. Scott F. Dye was admitted as Claimant's Exhibit 7. Counsel for both the claimant and the employer/carrier submitted post-hearing briefs.

BACKGROUND

The claimant, John Papai, was born on January 5, 1947. He has a high school education, some college-level training, and work experience as a mail clerk (1965-68), bartender (1971-86), and deck hand (1986-89). CX 5 at 118. On March 13, 1989, while employed by Harbor Tug and Barge to do painting work board the tugboat *P. T. Barrow*, the claimant fell from a ladder and severely injured his left knee. The claimant was later examined by Dr. Scott F. Dye, who performed surgery on the knee on May 17, 1989. CX 3 at 46. Dr. Dye described the surgery as an "arthroscopic partial lateral medial meniscectomy followed by chondroplasty of the medial femoral condyle, partial arthroscopic synovectomy and an anterior cruciate ligament reconstruction utilizing the central third of the patellar tendon." *Id*. According to Dr. Dye, the claimant's knee did not become permanent and stationary until February 5, 1990, at which time

Appendix G

Dr. Dye also determined that the claimant could not return to his job as a deck hand.[1] CX 3 at 54. In May of 1991 the claimant was again seen by Dr. Dye, at which time the claimant reported intermittent discomfort in his right hip after prolonged standing. CX 3 at 52. The claimant also reported pain in his back and hip to Dr. Dye in July, August, September, and December of 1991. CX 3, 7. According to Dr. Dye, the most probable cause of the hip and back pain described by the claimant is a modification of the claimant's gait which is in turn due to the injury to the claimant's left knee. CX 7 at 16, 21-23.

After it was determined that the claimant was permanently disabled from performing his past work as a deck hand, he was referred to Emily Tincher for vocational rehabilitation. Ms. Tincher first met with the claimant on August 6, 1990, and at that time the claimant expressed an interest in being retrained as an artist. CX 5 at 119. Ms. Tincher again met with the claimant on November 1, 1990, and arranged for him to have an "interview for informational purposes" with an engraving company located in San Francisco. CX 3 at 80. One of Ms. Tincher's reports indicates that on November 9, 1990, the claimant informed her that he had refused a $9.00 per hour job with the engraving company, an allegation that was denied by the claimant during the hearing. CX 3 at 81 and Tr. at 58. Following the interview at the engraving company, Ms. Tincher and the claimant decided

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1. During September 1989 the claimant's left knee buckled as he was going down some stairs, and, as a result, the claimant fell and fractured a bone in his right foot. Tr. at 45. The fracture was surgically corrected and the claimant's right foot was in a cast for six to eight weeks. Tr. at 46-47. The claimant testified that he was having no significant problems with his right foot by the time that his knee was found to be permanent and stationary in February of 1990, and that he has not any problems with the foot since then. Tr. at 48.

that the claimant would attend a three-semester graphic arts training program at San Francisco City College. However, due to a dispute over the claimants need to take a cab to and from classes, the claimant was not able to enroll in classes until the summer semester of 1990. CX 3 at 100, 86, 77. The claimant testified during the hearing that he had recently completed the third semester of the program and had received either A's or B's in all of his courses. Tr. at 59-63. As of the date of the hearing the claimant had not been employed since his initial injury on March 13, 1989. The parties stipulated that between the date of the initial injury and the date of the hearing the claimant had been paid weekly disability benefits of $238.46. Tr. at 8, 9.

ANALYSIS

The evidence in the record clearly shows that the injury to the claimants left knee on March 13, 1989, arose in the course of and out of the claimant's employment on the navigable waters of the United States. As well, it is undisputed that the claimant earned a total of $18,598.88 in the year preceding the injury. There are disputes in this case, however, concerning the following issues: (1) jurisdiction under the Longshore Act, (2) the claimant's average weekly wage, (3) the period of total disability, (4) the nature and extent of any permanent partial disability, and (5) the employers entitlement to relief under the provisions of subsection 8(f) of the Act.

1. Jurisdiction

The employer in effect concedes that the claimant's injury occurred on the navigable waters of the United States and arose out of and in the course of the claimant's employment. The employer argues, however, that at the time of his injury the

claimant may have been a Jones Act seaman and that, if so, jurisdiction under the Longshore Act is barred in this case by the provisions of subsection 2(3)(G) of the Act, 33 U.S.C. §902(3)(G), which excludes from the Acts jurisdiction "a master or member of a crew of any vessel." Thus, the employer further contends, if the claimant was in fact a seaman at the time of his injury the only remedy for his injury is under the provisions of the Jones Act, 46 U.S.C. App. §688.[2]

In *McDermott International, Inc. v. Wilander*, __ U.S. __, 111 S. Ct. 807 (1991), the Supreme Court clarified the standard for determining whether a particular claimant's remedy is under the Jones Act or the Longshore Act. According to the Court's decision, the Longshore Act "is one of a pair of mutually exclusive remedial statutes that distinguish between land-based and sea-based maritime employees" and only the Longshore Act

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2. It is noted in this regard that the claimant has filed a civil complaint against the employer in the United States District Court for the Northern District of California alleging that when he received the injury at issue in this case he was a seaman entitled to seek damages under the provisions of the Jones Act, 46 U.S.C. App. §688. The employer has responded to that complaint by alleging that the claimant was not a Jones Act seaman at the time of the injury. Since anyone who is a seaman for purposes of the Jones Act falls within the scope of the subsection 2(3)(G) exclusion from Longshore Act jurisdiction, the positions of both the claimant and the employer in the Jones Act case are necessarily in direct conflict with their positions in this case. Counsel for the employer has provided copies of orders of the District Court granting the employer's motion for summary judgment on the claimants Jones Act case on the grounds that the claimant was not a Jones Act seaman at the time of his injury. Since the District Court case also involves a claim under subsection 5(b) of the Longshore Act, 33 U.S.C. §905(b), these orders granting summary judgment are interlocutory in nature and therefore cannot be invoked in this case for purposes of applying the doctrines of *res judicata* or collateral estoppel.

applies to land-based workers. 111 S. Ct. 807, 814, 817. The Court further held that in making the distinction between land-based and sea-based employees, "[i]t is not the employee's particular job that is determinative, but the employee's connection to a vessel." 111 S. Ct. 807, 817. The Court's decision cited with approval the Fifth Circuit's decision in *Offshore Company v. Robison*, 266 F.2d 769 (5th Cir. 1959), which established a two-part test for determining crew member status. Under this test, an employee is a member of a crew if: (1) he was permanently assigned or performed a substantial part of his work on a vessel or fleet of vessels, and (2) his duties contributed to the vessel's function or operation.[3]

The claimant has described his maritime employment as "mostly deck hand work . . . casting off boats and landing boats." Tr. at 33. The resume prepared for him by the vocational rehabilitation specialist states that the claimant's work primarily involved ferry boats and tug boats and indicates that he handled lines used in mooring vessels and well as lines used for towing and for tying vessels to each other. CX 5 at 118. In addition, the claimant's work involved painting vessels, lubricating machinery, and repairing ropes and cables. *Id.* On the day the claimant was injured, his duties consisted of painting various parts of the a tug boat that was docketed at port facilities in Alameda, California. Tr. at 30-32.

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3. In *Bullis v. Twentieth Century-Fox Film Corp.*, 474 F.2d 392, 395 (9th Cir. 1973), the Ninth Circuit adopted a standard that required a claimant under the Jones Act to show that (1) the vessel on which he was employed was in navigation, (2) he had a more or less permanent connection with the vessel, and (3) he was aboard the vessel primarily to aid in navigation. The third prong of this test was in effect reversed by the Supreme Court's decision in *Wilander*.

Although some of the work performed by the claimant is the type of work that might be performed by a member of a ship's crew, the evidence also clearly indicates that at the time of the claimant's injury he was a "land-based" worker and therefore is entitled to seek a remedy for his injury under the Longshore Act. For example, the claimant's testimony indicates that all of his jobs were obtained by going to a union hiring hall on a daily basis and waiting to be assigned work according to seniority. Tr. at 33. The claimant's testimony also indicates that none of his jobs lasted more than two or three days at a time, and that, as a result, he had a variety of different employers and worked on a variety of different ships. Tr. at 32, 33 and CX 16-18. Since the claimant was not assigned to work on any particular ship, he lived on the shore, not on a ship. Tr. at 33. Although the claimant had worked aboard the *P.T. Barrow* before the date on which he was injured, the job the claimant was performing at the time of his injury was of only one day's duration. Tr. at 31, 66. It is obvious from these facts that the claimant's assignment to any particular vessel or fleet of vessels was random, sporadic and transitory. Given this lack of any permanent connection to any vessel or fleet of vessels, it necessarily follows that the claimant cannot be regarded as a member of the crew of any ship or fleet of ships. *See Griffin v. T. Smith & Son Inc.*, 25 BRBS 196 (1991). Accordingly, I find that the claimant's claim is not barred by the provisions of subsection 2(3)(G) of the Act, and that the claim is in all other respects within the jurisdiction of the Longshore Act.

2. Average Weekly Wage

The claimant does not dispute the employer's evidence indicating that in the year preceding the injury he earned $18,598.88, a level of earnings that results in a weekly compensation rate of $238.46. However, the claimant asserts

that his average weekly wage and compensation rate should be adjusted upward to account for the fact that if he had been able to continue working after the accident, he would moved into a higher union seniority category and therefore would have had a higher income.

A claimants average weekly wage is determined by utilizing one of three methods set forth in section 10 of the Act. 33 U.S.C. §910. Subsection 10(a) applies when a claimant worked in the same employment for substantially the whole of the year immediately preceding the injury. Subsection 10(b) applies when the claimant was not employed substantially the whole year preceding the injury, but there is evidence in the record of wages of similarly situated employees who have worked substantially the whole year. When neither subsection 10(a) nor 10(b) can reasonably be applied, such as in cases where a claimant's work has been discontinuous and intermittent, subsection 10(c) provides the general method for determining the appropriate average weekly wage. *Marshall v. Andrew F. Mahony Co.*, 56 F.2d 74, 78 (9th Cir. 1932). According to the exhibits and testimony in this case, the claimant's employment in the year preceding his injury was clearly discontinuous and intermittent. Accordingly, his average weekly wage must be calculated under the provisions of subsection 10(c).

In calculating an average weekly wage under subsection 10(c), the Act requires consideration of the earnings of the claimant in the job he was performing at the time of the injury, the earnings of other employees, and the wages earned by the claimant in other lines of employment. In addition, it has been held that in determining an average weekly wage under subsection 10(c), it is appropriate in some circumstances to consider wages that a claimant could have earned after the date

of the injury. *Tri-State Terminals Inc. v. Jesse*, 596 F.2d 752 (7th Cir. 1979). In that case, the court upheld a decision of the Benefits Review Board (BRB) that permitted a claimant's average weekly wage to be adjusted upward to account for the fact that following the injury to the claimant (a longshoreman), work opportunities for longshoremen increased substantially. This interpretation of subsection 10(c) has also been adopted in the Ninth Circuit. *Palacios v. Campbell Industries*, 633 F.2d 840 (9th Cir. 1980). In short, under these decisions the claimant would be entitled to have his average weekly wage adjusted upward if he could show that in the time period after his injury he would have had more work opportunities than he had in the period prior to the injury.

In order to show that his earnings would have been greater in the period following his injury than they were before the injury, the claimant testified that at the time of the injury he was close to achieving a higher union seniority level that would have given him more job opportunities. In particular, the claimant testified that when he was injured he needed only 137 more days of work in order to qualify for "B card" seniority status, and stated that with such higher seniority he would have been less subject to seasonal fluctuations in work opportunities for longshoremen. Tr. at 35-39. The claimant also estimated that he would have worked the 137 days needed for B card status by the end of the summer of 1989. Tr. at 38. Claimant's counsel argues that this testimony supports a conclusion that after achieving B card status the claimant would have worked an average of 16.6 days per month year round and therefore would have had an average weekly wage of $576.85, instead of the average weekly wage of $357.69 calculated by the employer.

Although I find that the claimant's average weekly wage

should be adjusted upward if, in fact, he would have had more job opportunities after achieving B card status, I cannot accept the claimant's calculation of the amount that his earnings would have increased. This calculation, which assumes that with a B card the claimant would have been able to work the same number of days each month, is directly contradicted by the claimant's own testimony that even B card holders are subject to seasonal fluctuations, although not as severely as C card holders. Tr. at 39. Moreover, given the lack of any specific evidence concerning actual job opportunities for B card holders, it appears that any attempt to calculate the claimant's probable future earnings would be entirely speculative. Mere speculation is insufficient to justify an increase in a claimant's average weekly wage. *See Todd Shipyards v. Director, OWCP*, 545 F.2d 1176 (9th Cir. 1976), and *Riddle v. Smith and Kelly Company*, 13 BRBS 416 (1981). Accordingly, it is necessary to find that the claimant has failed to meet his burden of proof on this issue and therefore is not entitled to any upward adjustment in his average weekly wage. Thus, I conclude that the claimant's average weekly wage is $357.69 and that his compensation rate is $238.46 per week.

3. Period of Total Disability

The claimant contends that he has been continuously totally disabled, either temporarily or permanently, since he was injured on March 13, 1989. The employer, on the other hand, contends that the claimant was totally disabled only from the date of his injury until November, 1990, when he was allegedly offered a job by an engraving company. For the reasons set forth below, I agree with the employer and find that the claimant was totally disabled-only until November 12, 1990.

It is well established that once it has been shown that a

claimant cannot return to his past job due to a work-related injury, the employee is presumed to be totally disabled unless the employer is able to successfully demonstrate the existence of suitable alternative employment for the claimant in the geographical area where the claimant resides. *See*, e.g., *Bumble Bee Seafoods v. Director, Office of Workers' Compensation Programs*, 629 F.2d 1327 (9th Cir. 1980); *Hairston v. Todd Shipyards Corp.*, 849 F.2d 1194 (9th Cir. 1988). To satisfy its burden of showing suitable alternative employment, the employer must point to *specific* jobs that the claimant can perform. *Bumble Bee*, *supra*, at 1330. In considering whether a claimant has the ability to perform particular work, the fact finder must also consider the claimant's technical and verbal skills, as well as the likelihood, given the claimant's age, education, and background, that the claimant would be hired if he diligently sought the possible job identified by the employer. *Hairston*, *supra*, at 1196, and *Stevens v. Director, OWCP*, 909 F.2d 1256 at 1258 (9th Cir. 1990). If an employer makes the requisite showing of suitable alternative employment, a claimant may rebut the employer's showing, and thus retain entitlement to total disability benefits, by demonstrating that he diligently tried to obtain such work, but was unsuccessful. *See Palombo v. Director, OWCP*, 937 F.2d 70 (2nd Cir. 1991); *Newport News Shipbuilding and Dry Dock Company v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP*, 784 F.2d 687, 691 (5th Cir. 1986); and *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139, 141 (1986).

In this case, there are four distinct periods of time that are of relevance in determining the duration of the claimant's period of total disability. The first relevant period runs from March 13, 1989, when the claimant was inured, until February 5, 1990,

when Dr. Dye determined that the claimant's condition was permanent and stationary and that the claimant was physically incapable of performing his past work. CX 3 at 54. The employer does not dispute the fact that the claimant was temporarily totally disabled during this entire period. Accordingly, I find that the claimant was temporarily totally disabled from March 13, 1989, until February 5, 1990.

The second relevant period runs from February 5, 1990 (when Dr. Dye found the claimant to be permanent and stationary), until November 12, 1990 (when the claimant allegedly could have begun working for a San Francisco engraving company).[4] Although the employer has submitted vocational reports and provided testimony of a vocational expert concerning suitable alternative employment for the claimant, none of this evidence directly shows that any specific employment opportunities were available to the claimant during this particular period. I therefore find that the employer has failed to prove that suitable alternative employment was available to the claimant prior to November 12, 1990, and that the claimant was totally disabled from February 5, 1990, until November 12, 1990.

The third relevant period runs from November 12, 1990, until February 1, 1992, when Dr. Aubrey A. Swartz found that back and hip problems associated with the claimant's knee injury had become permanent and stationary. CX 4 at 64-68. There is a clear dispute between the claimant and the employer concerning the availability of suitable alternative employment during this

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4. The record does not directly indicate the specific date on which the job with the engraving company was available. However, the most likely date appears to be November 12, 1990. *See* CX 5 at 81-84 and Tr. at 58.

period. The employer contends in essence that suitable alternative employment became available to the claimant on November 12, 1990, when the claimant allegedly could have begun working for the engraving company. In contrast, the claimant denies ever receiving such an offer of employment and contends that in any event he would have been unable to perform any work from as early as December 1990 until February 1992 due to back and hip pains that are indirectly attributable to the injury to his left knee.

To resolve this dispute it is first necessary to determine if in fact the job at the engraving company constituted suitable alternative employment for the claimant. In this regard, the record indicates that after participating in the interview with the engraving company the claimant understood what the job required and thought that the job was "OK" for him physically. CX 5 at 81 and Tr. at 82. The record also indicates that the claimant had the technical and verbal skills necessary for the job; indeed, the resume and vocational report that Ms. Tincher sent to the engraving company on the claimant's behalf suggests that the claimant was particularly well suited to the job. CX 5 at 112. Accordingly, the only remaining issue is whether the employer has shown that it was likely that the claimant would have been hired if he diligently sought the job. On this issue I find in favor of the employer. The strongest evidence in favor of the employer on this issue is the statement in Ms. Tincher's November 17, 1990, report that the claimant told her on November 9, 1990, that he had been offered the job and refused it. CX 5 at 81. Although at the hearing the claimant denied receiving or refusing such a job offer, his testimony on this issue was not convincing and is clearly inconsistent with Ms. Tincher's report, which mentions the job offer in two separate passages and indicates that the claimant was concerned that by refusing the job he was

jeopardizing his future vocational rehabilitation. *See* Tr. at 80-86 and CX 5 at 79-82. It is also noteworthy that the claimant himself believes that he had a discussion with Ms. Tincher concerning the consequences of refusing a job offer from the engraving company. Tr. at 83. Ms. Tincher's report also indicates that the claimant stated that he had several reasons for disliking the job and that he was more interested in vocational training than in quickly finding another job. CX 5 at 81-84.[5] Moreover, even if the claimant's testimony that he was not offered a job by the engraving company could be accepted at face value, it would still be necessary to find that it is more likely than not that the claimant would have been offered the job if he deligently sought it. For example, Ms. Tincher's report of November 17, 1990, indicates that on November 8, 1990, an officer of the engraving company told Ms. Tincher that she was "very impressed" with the claimant and would like to interview him again on November 12, if he was still interested in the job.[6] CX 5 at 81.

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5. Claimant's counsel has attempted to discredit Ms. Tincher's report by characterizing it as hearsay. While it is true that the report was prepared out of court and introduced to prove the truth of the matters asserted therein — thereby coming within the traditional definition of hearsay — it is also a document that was obviously prepared in the ordinary course of business and otherwise meets the requirements of the so-called business records exception to the hearsay rule. *See* Federal Rule of Evidence 803(6). Accordingly, this document is entitled to be given probative value. Of course, even if Ms. Tincher's report were not admissible under the Federal Rules of Evidence, it could still be considered in a proceeding under the Longshore Act. 20 C.F.R. §702.339.

6. Although the statements made by the engraving company official in this conversation suggest that the engraving company had not yet in fact formally offered a job to the claimant, it also has to be recognized that the engraving company may have been withholding a formal job offer until it had finalized the 50 percent subsidy for the claimant's starting wages that Ms.

(Cont'd)

The claimant has argued that even if he could have obtained the job with the engraving company, he would have been unable to perform it after May 1991 due to hip and back pains associated with his knee injury. The strongest evidence in support of this contention is contained in the reports and deposition testimony of Dr. Dye. In particular, in his deposition testimony Dr. Dye stated that between the time he examined the claimant on May 20, 1991, and December 4, 1991, he considered the claimant to be temporarily totally disabled because treatment of pain the claimant reported in his right hip and back required that the claimant be "in bed most of the day and off his feet most of the time." CX 7 at 20; *see also* CX 7 at 24 and 63.

Although Dr. Dye was the claimant's treating physician and his opinion is entitled to be given substantial weight, Dr. Dye's statement that the claimant's hip and back pain rendered him temporarily totally disabled is inconsistent with much of the other evidence in this record. For example, the report of Dr. Eugene Wolf's examination of the claimant on July 31, 1991, indicates that the claimant described his right hip pain at that time as merely a burning sensation and his back pain as a dull ache. Dr. Wolf apparently did not believe that the claimant's hip and back pain warranted any change from the conclusions Dr. Wolf reached following his evaluation of the claimant on March 8, 1990. In addition, Dr. Wolf described the claimant's back pains as of no "significant consequence." EX 5 at 351-52. Likewise, when Dr. Swartz examined the claimant on February 1, 1992, he

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Tincher had offered to provide in her letter to the company of November 2, 1990. CX 5 at 112. This offer of a 50 percent wage subsidy is also another factor that suggests that the claimant would have been hired for this job if he had diligently sought it.

described the claimant's back pain as being "slight" except when the claimant engaged in repetitive bending or heavy lifting, in which case Dr. Swartz described the pain as "moderate." Dr. Swartz also characterized the claimant's hip pain as "slight." CX 4 at 66. Neither Dr. Wolf or Dr. Swartz suggested that the claimant needed any periods of bed rest in order to treat these conditions. Similarly, at the hearing Dr. Walter Indeck testified that Dr. Dye's treatment of the claimant's hip and back complaints was not consistent with a significant medical problem. Tr. at 145-46. Dr. Indeck also noted that Dr. Dye's reports during this period do not state that the claimant was temporarily totally disabled. Tr. at 146. Dr. Indeck's testimony and the other evidence in the record also indicate that the claimant did not follow up on Dr. Dye's recommendation that he consult another physician concerning his hip pain, a failure that suggests that the claimant's hip pain was not a serious problem for him. Tr. at 183-84. Most significantly, the claimant's own activities between May 1991 and February 1992 suggest that he was not totally disabled during this period. For example, the claimant testified that he began attending San Francisco Community College in the summer of 1991 and missed only three classes because he had "a cold or something." Tr at 59-61, 78. Likewise, the claimant testified that he took four courses in the fall of 1991 and had no attendance problems. Tr. at 61. It is also highly significant that although the claimant asserts that he was not capable of returning to light duty work in October 1991, the claimant's wife contacted Ms. Tincher during that same month and asked her to see if there was any light work the claimant could do. Tr. at 78.

In view of the substantial amount of evidence indicating that the claimant's back and hip pain were not in fact significantly disabling between May 1991 and February 1992, I cannot accept

Dr. Dye's opinion that the claimant was temporarily totally disabled during this period. Rather, I find that the claimant has failed to demonstrate that he could not have performed the engraving company job that, as I have already found, became available to him in November 1990.

The fourth relevant period of possible total disability runs from February 1, 1992, until the present. The employer has presented vocational testimony and reports indicating that the claimant could have been employed in various jobs during this period, and the claimant has presented conflicting vocational evidence. It is not necessary, however, to resolve the conflicts between the vocational experts. As previously noted, suitable alternative employment was available to the claimant in November 1990, which he has been found capable of performing from November 1990 until February 1992. Nothing in the record suggests that the claimant was any less capable of performing such work between February 1992 and the present.

In sum, I find that the claimant was totally disabled from March 13, 1989, until November 12, 1990, when suitable alternative employment became available to him.

4. Nature and Extent of Any Permanent Partial Disability

The evidence shows that the claimant's March 13, 1989, injury has affected four parts of his body: (1) his left knee, (2) his right foot, (3) his right hip, and (4) his back.

Left Knee. There is no dispute that the claimant directly injured his left knee in the March 13, 1989, accident, and that as a result of this injury the claimant is permanently unable to do his past work as a deck hand. It is also clear that the claimant's left

knee has been permanent and stationary since February 5, 1990. Since a knee injury is considered to be a scheduled impairment, subsections 8(c)(2) and 8(c)(19) of the Longshore Act govern the calculation of the benefits for this injury. Under these subsections a worker who suffers a knee injury is entitled to that portion of 288 weeks compensation that is equal to the percentage of use of the worker's leg that has been lost. The claimant contends that in this case the appropriate percentage figure is 45 percent. In contrast, the employer argues that the appropriate figure is 30 percent.

Significantly, all three of the physicians who have rated the claimant's knee injury under the AMA guidelines have arrived at the same percentage disability: 30 percent. See EX 7 (Dr. Indeck), EX 4 (Dr. Wolf), and CX 4 (Dr. Swartz). The claimant notes, however, that Dr. Indeck and Dr. Wolf assigned different weights to different factors in arriving at their total disability ratings of 30 percent and contends that a total disability rating of 45 percent can be achieved by adding together those separate portions of Dr. Wolf's and Dr. Indeck's ratings that are most favorable to the claimant. Although the claimant's argument is ingenious, it is not persuasive enough to overcome the substantial weight that must be given to the fact that all three of the physicians who rated the claimant's knee, including one apparently retained by the claimant, have arrived at identical disability ratings.[7] Accordingly, I find that the claimant has lost 30 percent of the use of his left leg and is therefore entitled to receive permanent partial disability benefits equal to 30

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7. It is also noted that at least two of the physicians considered pain in determining a rating for the claimant's knee. *See* Tr. at 175 (testimony of Dr. Indeck) and CX 4 at 69 (report of Dr. Swartz).

percent of 288 weeks compensation, i.e., 86.4 weeks compensation.[8]

Right Foot. As previously noted, the claimant's right foot was broken as an indirect result of the claimant's left knee injury. Consequently, the injury to the right foot is a compensable injury. *See Cyr v. Crescent Wharf and Warehouse Co.*, 211 F.2d 454 (9th Cir 1954). It is clear from the medical evidence and the claimant's testimony that the claimant's right foot is now permanent and stationary. Since injuries to a worker's foot are considered to be scheduled injuries, the determination of benefits for this injury is governed by the provisions of subsections 8(c)(3), (c)(4), and (c)(19) of the Act. The only medical evidence in the record quantifying the loss of use of the claimant's right foot is the February 1, 1992, report of Dr. Swartz. CX 4 at 64. Although Dr. Swartz has represented that the injury to the claimant's right foot does not meet the criteria for percentage loss calculations (CX 4 at 69), the claimant argues that the measurements made by Dr. Swartz concerning the range of motion of the claimant's right ankle and subtalar joint actually show a 12 percent loss of use of the claimant's right leg under the AMA's Guide to the Evaluation of Permanent Disabilities, revised third edition. I agree with the claimant's argument that Dr. Swartz was in error when he represented that the injury to the claimant's right foot is not ratable under the AMA guidelines. Comparison of Dr. Swartz's measurements against the AMA guidelines clearly indicates that there has been a ratable loss of

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8. It is noted that some of the loss of use of the claimant's left knee may be attributable to an injury suffered by the claimant while he was in high school. However, even if this were the case, it would not reduce the employer's liability for the entire 30 percent loss of use. *See Strachen Shipping Co. v. Nash*, 782 F.2d 513 (5th Cir. 1986).

use in the claimant's right foot. However, according to the guidelines for rating foot injuries the claimant has suffered only a seven percent loss of use (two percent loss of use for restricted plantar-flexion, three percent loss of use for restricted inversion, two percent loss of use for restricted eversion and no loss of use for restricted dorsi-flexion).[9] Accordingly, I find that the claimant has lost seven percent of the use of his right leg and is therefore entitled to receive permanent partial disability benefits equal to seven percent of 288 weeks compensation, i.e., 20.16 weeks compensation.

Right Hip. The claimant contends that the injury to his left knee has altered his gait and that as a result he suffers pain in his right hip. At the hearing the claimant described the pain in his hip as a continuing "dull ache" and stated that he also has a burning sensation running from his right hip to his knee. Tr. at 50. The reports of two physicians contain similar descriptions. EX 5 at 351-52 and CX 4 at 66. Although the employer apparently does not dispute the fact that an altered gait can produce hip pain, the employer does dispute the contention that the claimant's gait has been materially altered as a result of his knee injury. Moreover, the employer suggests that the claimant may well have fabricated complaints of hip and back pain in order to increase his disability benefits.

There is a variety of medical evidence concerning a possible alteration of the claimant's gait. In his deposition Dr. Dye

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9. Claimant's calculation of a 12 percent loss of use is apparently based on the differences between the claimant's left and right feet as measured by Dr. Swartz. However, the relevant charts in the AMA guidelines do not use such a standard. Instead, they appear to compare measurements of an injured foot with measurements of normal feet from the general population.

attributed the claimant's complaints of hip and back pain to an altered gait, and testified that he observed the claimant limping on intermittent occasions. Tr. at 15-16, 22, 58-59. In contrast, Dr. Wolf reported that the claimant appeared to have a normal gait when he examined the claimant on July 31, 1991. EX 5. Likewise, Dr. Indeck reported that the claimant walked with a completely neutral gait during his examination of the claimant on April 24, 1992. EX 6 at 368. Also, at the hearing Dr. Indeck testified that the claimant showed absolutely no evidence of an altered gait in a surveillance film showing the claimant walking down a hill on November 22, 1991. Tr. at 147.

Although the employer has presented evidence indicating that on at least three occasions the claimant's gait was not altered, this evidence is not necessarily inconsistent with Dr. Dye's testimony that he occasionally observed the claimant limping. It is also noted that none of the medical reports has suggested that the claimant is exaggerating his symptoms and that Dr. Dye testified that it is not uncommon for someone who has had a significant knee injury to develop an altered gait as a result. CX 7 at 22. For these reasons, I conclude that at least on some occasions the claimant's gait has been altered by his knee injury and that as a result he may suffer occasional pain in his right hip and leg. The claimant has argued that this pain has resulted in a 10 percent loss of use of his right leg. However, I find that any pain the claimant may have in his right hip and leg is not compensable. Although in theory pain by itself can result in the partial loss of use of a limb and therefore can be compensable under subsection 8(c) of the Act, there is nothing in the record of this case directly indicating that any pain in the claimant's right hip and leg is so severe that it limits in some way the claimant's use of his right leg. Moreover, even if it could be assumed that pain limited the use of the claimant's right hip and leg, there is no

evidence from any physician attempting to quantify the extent of any such loss of use. Indeed, Dr. Swartz described the claimant's hip pain as not being ratable. CX 4 at 69. Accordingly, it is not possible to arrive at an award of benefits for any loss of use of the claimant's right leg that would not be entirely speculative.

4. *Back Pain*. The claimant has also alleged that the alteration in his gait has caused him to suffer back pain. It is well established that an injury to a claimant's back is not a scheduled injury and therefore has to evaluated under subsection 8(c)(21) of the Act. That provision specifies that the compensation for unscheduled disabilities shall be two-thirds of the difference between the injured employee's average weekly wage and the employee's wage earning capacity after the injury. Since subsection 8(c)(21) bases benefits on the difference between a claimant's average weekly wage and his post-injury wage earning capacity, a claimant under the Longshore Act may not recover benefits for an unscheduled injury unless the injury actually reduces his earning capacity. *See Arrar v. St. Louis Shipbuilding Company*, 837 F.2d 334 (8th Cir. 1988). Significantly, in this case the claimant has not alleged that his back pain has reduced his wage earning capacity and none of the medical reports suggests that such a loss has occurred.[10] Accordingly, I find that the claimant is not entitled to any monetary compensation for any back pain that may have been the result of the injury to his left knee.[11]

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10. For example, Dr. Wolf reported that the claimant's low back pain required no treatment and was not ratable. EX 5. Likewise, Dr. Indeck found that the claimant's complaints of back pain did not warrant any specific work preclusion or medical treatment. EX 6 at 371. Dr. Swartz also concluded that the claimant's back condition did not meet any disability rating criteria. CX 4 at 66.

11. It is noted that if in fact the claimant's back impairment were (Cont'd)

5. The Employer's Entitlement to Subsection 8(f) Relief

The employer has filed an application indicating that if the claimant's injuries are found to be compensable, it should be granted relief pursuant to the provisions of subsection 8(f) of the Act. To obtain such relief an employer must show that (1) the claimant had an existing permanent partial disability prior to the last injury, (2) that the disability was manifest to the employer, and (3) that the current disability was not due solely to the most recent injury. *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836, 839 (9th Cir. 1982). *See also FMC Corp. v. Director. OWCP*, 886 F.2d 1185 (9th Cir. 1989). In general, if subsection 8(f) is found to apply an employer is relieved of the responsibility for paying permanent disability compensation after 104 weeks. In cases involving non-hearing loss scheduled disabilities, however, an employer is ordinarily liable for the period of weeks of scheduled disability benefits that are attributable to the subsequent injury, even if that period exceeds 104 weeks. *Davenport v. Apex Decoration Company*, 18 BRBS 194, 196, n. 1 (1986). *See also Strachan Shipping Co. v. Nash*, 782 F.2d 513 (5th Cir. 1986). The 104 week period in subsection 8(f) does not include any periods in which temporary disability payments were due. *Romanowski v. I.T.O. Corp.*, 4 BRBS 59 (1976).

It is possible that the evidence in this record is sufficient to meet the three conditions for subsection 8(f) relief. However, it

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compensable under the provisions of subsection 8(c)(21), then all of the claimant's impairments would have to be evaluated under that provision. *See Frye v. Potomac Electric Power Company*, 21 BRBS 194, 198 (1988), and *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94 (1988).

has been determined that all of the claimant's compensable disabilities are scheduled injuries. Consequently, under the provisions of subsection 8(f) the employer is not entitled to relief, even though the claimant is entitled total more than 104 weeks of benefits for these injuries. The employer's request for subsection 8(f) relief must therefore be denied.

ORDER

1. The respondents shall pay the claimant compensation for total temporary disability for the period between March 13, 1989, and February 2, 1990, at a compensation rate of $238.46 per week.

2. The respondents shall pay the claimant compensation for total permanent disability for the period between February 2, 1990, and November 12, 1990, at a compensation rate of $238.46 per week.

3. The respondents shall pay the claimant compensation for permanent partial disabilities in his left knee and right foot for a total of 106.56 weeks beginning November 12, 1990, at a compensation rate of $238.46 per week.

4. The respondents shall receive credit for all compensation paid to the claimant since March 13, 1989.

5. The claimant is entitled to interest on all past due compensation at the rate prescribed at 28 U.S.C. §1961.

6. The District Director, OWCP, shall make all calculations necessary to carry out this order.

7. The employer's request for relief under the provisions of subsection 8(f) of the Act is denied.

8. Counsel for the claimant shall within 30 days of the date of this order submit a fully supported fee petition and simultaneously serve a copy thereof on opposing counsel. Opposing counsel shall have 20 days from the date of service of the petition in which to respond.

s/ Paul A. Mapes
Paul A. Mapes
Administrative Law Judge

Date: AUG 27 1992
San Francisco, California

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing Compensation Order was filed in the Office of the Regional Director, Thirteenth Compensation District and a copy thereof was mailed by certified mail to the parties and their representatives at the last known address of each on August 31 1992.

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Appendix G

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copy was also mailed by regular mail to the following:

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Daniel W. Teehan, Regional Solicitor, U.S. Department of Labor, 71 Stevenson Street, P. O. Box 3495, San Francisco, CA 94119-3495.

Associate Solicitor of Labor for Employee Benefits, U.S. Department of Labor, Suite N-2620, 200 Constitution Avenue, N.W. Washington, D.C. 20210.

Appendix G

s/ Diana Bigham, for
D.L. OPPENHEIM
District Director
13th Compensation District

APPENDIX H — RELEVANT STATUTES

33 U.S.C. § 902. Definitions

When used in this chapter —

. . .

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include —

. . .

(G) a master or member of a crew of any vessel;

. . .

46 U.S.C. § 688 (a)

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . .